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No. 1216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

SID W. RICHARDSON FOUNDATION, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SID W. RICHARDSON FOUNDATION, Petitioner

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sid W. Richardson Foundation (a Texas non-profit, tax-exempt corporation) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the trial Court (the District Court of the United States for the Northern District of Texas, Fort Worth Division) was delivered on April 1, 1969. It is reported at 306 F. Supp. 755, and is set out in full in the Appendix hereto, pp. 33 to 38, infra.

The original opinion of the United States Court of Appeals for the Fifth Circuit was delivered on June 22, 1970, and the Per Curiam opinion of said Court, on petition for rehearing, was delivered on August 17, 1970. They are reported at 430 F. 2d 710, and are reproduced in the Appendix hereto at pp. 39 to 50.

JURISDICTIONAL STATEMENT

The final judgment of the Court of Appeals was entered on October 23, 1970. Petitioner's first petition for rehearing (filed on June 26, 1970) was denied August 17, 1970. The second petition for rehearing (filed September 21, 1970) was denied October 23, 1970. The jurisdiction of this Court is invoked by writ of certiorari under 28 USC Section 1254(1), because (a) of conflicts in the decision by the Court of Appeals with decisions of other Courts of Appeals and with decisions of this Court; and (b) the decision by the Court of Appeals departs from the accepted and usual course of judicial proceedings calling for the exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. Whether the action of the Circuit Court in refusing to consider the question of whether any debt in Petitioner's refund claims was waived, such waiver having been clearly established and repeatedly urged, and thereby refusing to make any holding with respect to Petitioner's primary claim that in computing the taxable income of the Estate of S. W. Richardson (Petitioner's Transferor) for its fiscal years ended September 30, 1959 and September 30, 1960, said Estate was entitled, under Section 642(c), I. R. C. of 1954, and the undisputed facts, to deduct a sufficient amount of Estate's gross income for those years to offset its taxable income for such years computed before any allowance for a charitable deduction, pursuant to legislation in practice which should not be

overlooked but which should be corrected by this Court.

2. Whether the aforesaid action of the Circuit Court conflicts with the holdings of this Court, its own holdings, and those of other Circuit Courts to the effect that inadequacies in tax refund claims (if they exist, which they did not here) are waived when the basic question was placed, briefed, and argued on its merits in the Trial and Appellate Courts and no suggestion of the inadequacy of the claims was made until after submission of the case in the Appellate Court.

3. Whether Petitioner's right to an "Unlimited Charitable Deduction" under Section 642(c), I. R. C. of 1954, was clearly established by undisputed facts so that the failure so to hold conflicts with the decisions of this Court, of the Fifth Circuit, and those of other Circuits.

STATUTES AND REGULATIONS INVOLVED

Section 642(c), IRC of 1954:

> "DEDUCTION FOR AMOUNTS PAID OR PERMANENTLY SET ASIDE FOR A CHARITABLE PURPOSE. — In the case of an estate or trust (other than a trust meeting the specifications of subpart B) there shall be allowed as a deduction in computing its taxable income (in lieu of the deductions allowed by section 170(c), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a purpose specified in section 170(c), or is to be

used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit. For this purpose, to the extent that such amount consists of gain from the sale or exchange of capital assets held for more than 6 months, proper adjustment of the deduction otherwise allowable under this subsection shall be made for any deduction allowable to the estate or trust under section 1202 (relating to deduction for excess of capital gains over capital losses). In the case of a trust, the deduction allowed by this subsection shall be subject to section 681 (relating to unrelated business income and prohibited transactions)." (Emphasis supplied)

Section 61, IRC of 1954:

GROSS INCOME DEFINED.

"(a) GENERAL DEFINITIONS. — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance pay-

ments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust."

SECTION 7422, IRC of 1954 — CIVIL ACTIONS FOR REFUND:

"(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Pertinent sections of Treasury Regulations under Section 6402, IRC of 1954, and Section 7422, IRC of 1954, are reproduced in the Appendix hereto, pp. 51 and 52-3.

STATEMENT

Petitioner (Sid W. Richardson Foundation, a Texas charitable corporation without capital stock and at all times exempt from Federal income taxes under Section 501(c)(3), Internal Revenue Code of 1954) is admittedly the transferee of the assets of the Estate of Sid W. Richardson (Estate), and, as such, liable for the Estate's obligations.

Richardson died testate September 30, 1959. His will made certain specific bequests, aggregating some $15,000,000 (to be satisfied in cash or property in the discretion of the executors) to individuals, and devised the residue (after payment of taxes, debts, and charges) of his estate to Foundation. The will provided: "There shall be included in the residue of my estate disposed of hereby all of the income, if any, received by or accrued to my estate during the administration thereof." The will and codicil are set out in full in the Appendix, pp. 54 to 72, and the quoted statement appears at page 65.

Estate filed Federal income tax returns on the accrual basis and for fiscal years ending on September 30. The tax years involved here are those ending September 30, 1960 and September 30, 1961. For those years, it was determined (and not contested below or here) that Estate's taxable income for said years before any allowance for the charitable deduction authorized by Section 642(c) of the Code was $1,155,692.12 for fiscal 1960 and $7,774,847.46 for fiscal 1961, while its stipulated gross income (App. 32) for those years

was $15,672,905.55 and $17,837,874.33, respectively.[1] The taxing authorities deducted only $671,906.22 and $7,474,421.32 as allowable charitable deductions for the respective years, and assessed tax liabilities for said years of $411,461.55 and $224,906.92, respectively, which, with interest, were paid by Petitioner on July 31, 1964.

All of the specific bequests made in the Richardson will were satisfied out of cash on hand at Richardson's death or with specific properties then on hand (with the exception of a payment of $1,000.00 per month to a sister for her life, which was by the will charged upon and was to be paid from corpus going to Petitioner), and no part of Estate's income was used for such purposes. App. 32.

Effective January 1, 1962, all of the Estate's assets were transferred to Petitioner, subject to all valid unpaid claims against Estate. Petitioner borrowed $30,000,000.00 to pay the balance of estate and inheritance taxes then due (the total taxes were in excess of $40,000,000.00) and proceeded to manage the properties so received, to pay debts, and to devote available income to its charitable purposes.

Petitioner filed claims for the refunding of the taxes and interest so paid. (These claims, App. 73, clearly advanced the contention that Estate was entitled, under Section 642(c), IRC of 1954, to deduct for each year a sufficient amount of its gross income to offset its taxable income computed without any charitable

[1]Only additional amounts of $434,025.00 for fiscal 1960 and $300,708.14 for fiscal 1961 need be allowed as charitable deductions to offset taxable income as determined by the taxing authorities.

deduction.) After the rejection of the claims, Petitioner filed suit in the United States District Court for the Northern District of Texas (Fort Worth Division) for recovery. That Court had jurisdiction under 28 USC Section 1346(a)(1).

In the District Court, Petitioner, by pleading and evidence, advanced two grounds for recovery: one, that by virtue of Section 642(c), IRC of 1954, the charitable deductions to which Estate was entitled were limited only by the amount of its gross income for the respective years, which, by the terms of the will, was to go (and did go) to charity. App. 75. The other ground was that the taxing authorities had erroneously treated Estate's income from a tax-option corporation (Subchapter S, Secs. 1371 through 1378, 1954 Code).

Defendant's answer in the trial Court replied to both grounds advanced in Petitioner's complaint. (App. 76-7) In its pretrial order, the trial Court recognized that both theories of recovery were involved. (App. 78-9) The case was heard on August 2, 1965, by the Court, without a jury, on a stipulation of facts (which dealt extensively with both questions) and brief oral testimony, which the Court accepted as correct (App. 23), but was not decided until April 1, 1969. The briefs of both parties in the trial Court argued for and against the unlimited charitable deduction. (App. 80 et seq. 102 et seq.)

The trial Court's opinion clearly recognized that both questions were before him by stating (App. 23-4):

"The following outline of the issues and the

ultimate facts will help to understand the later detailed discussion:

> "1. Pursuant to Section 642(c) of the Internal Revenue Code of 1954, the Estate, in computing its taxable income, was entitled to a charitable deduction for any amount of its gross income, without limitation, which, pursuant to the terms of the Richardson will, was permanently set aside, paid or used for charitable purposes."

(The phrase "or used" is a misquotation. The correct one reads, "or is to be used.")
but did not deal with this point further except to state (App. 32):

> "The gross income of the Estate for its fiscal year ended September 30, 1960, was $15,673,905.-55, and for its fiscal year ended September 30, 1961, was $17,837,874.33. No part of the revenues received by the Estate during those fiscal years was used for any purpose other than operation, maintenance and protection of the properties of the Estate, and payment of debts and taxes, including death duties, and expenses of administration."

The only holding made by the trial Court was against Petitioner's contention on the Subchapter S question.

An immediate appeal to the United States Court of Appeals for the Fifth Circuit followed. The parties briefed both questions, and, at submission on January 13, 1970, argued both questions. (App. 106-7, 108-9)

Up to that date, no suggestion had been made that the refund claims did not adequately present both

questions, but in a memorandum filed by the Defendant on or about February 26, 1970, this inadequacy was first suggested. The right to amend the claims, if such amendment was necessary, had expired on July 31, 1966, while the case was "in the bosom" of the trial Court.

The original opinion of the Circuit Court (June 23, 1970, after the alleged inadequacy of the claims had been suggested on February 26, 1970) held that the claims did not properly present the "unlimited charitable deduction" question but supported this statement by quoting from a protest filed at the administrative hearing level with the Internal Revenue Service before the tax was assessed and paid. (App. 47-8) Petition for rehearing followed in which this error was pointed out, the adequacy of the refund claims reasserted, and the point advanced that if the claims were inadequate, the defect was waived by failure to raise the question until after the case had been submitted in the Circuit Court. (App. 110) The Court's opinion on rehearing again held the claims inadequate, but did not deal with the waiver question. A second petition for rehearing, again asserting the waiver, was filed and denied without opinion. (App. 111)

The Circuit Court's Per Curiam opinion recognized its error in quoting from the administrative protest as if it were the refund claims, and set out the pertinent language of one of the refund claims. Although the quoted language in the claims contained the following statement:

"By virtue of Section 642(c), I. R. C. of 1954,

> and the will of said decedent, said Estate was entitled to an unlimited charitable deduction in computing its income tax liability for the fiscal year ended September 30, 1960, in an amount not in excess of its gross income for said period, which gross income exceeded its net income, and owed no income tax for said period," (The other claim contained identical language except the fiscal year was that ended September 30, 1961.)

the Court reaffirmed its earlier conclusion that the theory of the claim "was based upon the contention that the undistributed Subchapter S income of Richardson Oils was a part of the Estate as distinguished from the corporate entity." (App. 49-50)

No reference was made in the Per Curiam opinion to Petitioner's contention, advanced in the first (as well as the later) petition for rehearing (App. 110-112), that Defendant, by contesting the issue on its merits, had waived its right, if any it had, to question the adequacy of the refund claims, but it contained the following:

> "Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the Court."

This was followed by a statement to the effect that the Court adhered to its views on the Subchapter S question.

The only statement in either of the Circuit Court's opinions which could possibly be considered as referring to the merits of the unlimited charitable deduction question is in Footnote 8 of the original opin-

ion, which reads:

> "If we reached this question, we seriously doubt that the Foundation's argument could be accepted. It insists again on deductions for amounts never received by the Estate and never designated for charitable uses." (Emphasis supplied)

The quoted statement is wholly erroneous. It was established by stipulation, and found by the trial Court, that:

1. The will devised all of the residue of the estate, after payment of debts, etc., and all income "received or accrued" during the administration, to Petitioner (App. 64-5);

2. No income went to the specific legatees (App. 29);

3. The administration of the Estate was properly conducted and no income was used except to preserve estate properties, pay debts, taxes, and administration expenses (App. 28-9); and,

4. All of the residue and accumulated income was delivered to Foundation as of January 1, 1962. (App. 29)

These four points, with the stipulation of the amount of Estate's gross income for the years, clearly established, under the decisions of this Court and those of the Fifth Circuit and other Circuit Courts, that the charitable deductions to which Estate was entitled for each year greatly exceeded its taxable income calcu-

lated without any charitable deduction, and that it owed no income tax for either year.

Further, the record clearly establishes that, by the gross errors committed by the Fifth Circuit Court, Petitioner has been deprived of any serious consideration or holding with respect to its meritorious claims, so that, if that Court's holding (after appropriate consideration) was adverse, Petitioner could seek review by this Court upon the merits of the question, rather than, as Petitioner is forced to do here, primarily upon the "basis of irregularities in practice • • • which should not be overlooked."

ARGUMENT

1. The prime reason why the writ sought should be granted is that, by the wholly erroneous and insupportable holding of the Court below that the claims for refund were inadequate to present the "unlimited charitable deduction" question, and its equally erroneous and insupportable failure to hold that such inadequacy (if it existed) was waived, the Circuit Court deprived Petitioner of any consideration of its primary position that Estate was entitled, under Section 642(c), IRC of 1954, to deduct a sufficient amount of its gross income to offset taxable income computed without charitable deduction for each year; and this action (or non-action) constituted an irregularity in practice which should not be overlooked but should be corrected. *Duke Power Company v. Greenwood County S. C., et al*, 299 U. S. 259.

The holding of the Circuit Court that the refund

claims were inadequate to present the "unlimited charitable deduction" question, and therefore, necessarily, that the claimed inadequacy had not been waived, directly conflicts with the holding of this Court in *Tucker v. Alexander*, 275 U.S. 228, where this Court said (p. 231):

> "Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States. (Citing authorities) But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. *The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.* If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. *If the Commissioner is not deceived or misled by failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings.* We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose." (Emphasis supplied)

Such holding also conflicts with the holding of the Fifth Circuit Court in its Per Curiam opinion on motion for rehearing in *U. S. v. Smith*, 418 F. 2d 589, at Page 597, et seq., where it was said, after citing *Tucker v. Alexander*, supra:

> ". . . A careful review of both the appendix designated by the parties and the court reporter's original transcript reveals that the government made no objection to the raising of this issue at trial below and no later motion to strike the testimony. *Actually government counsel picked up the gauntlet by cross-examining the taxpayer and his accountant on the assumption question.* We conclude that the government should not be heard now to assert for the first time that proof of assumption of partnership liabilities by the corporation is at variance with the proceedings before the Commissioner and therefore cannot be considered in the taxpayers' refund suit." (Emphasis supplied)

The holding also conflicts with *Brown v. U. S.* (CA 9), 427 F. 2d 57-62, and *Mennen Co. v. Kelly* (CA 3), 137 F. 2d 866-868.

We have found no case holding that conduct even remotely comparable to that of Defendant in this case did not constitute a waiver of a defect in a tax refund claim.

The gross unfairness of the Defendant's action, as well as that of the Court below in its holding, is emphasized by the fact that the suggestion of inadequacy was made years after Petitioner's right to amend the claims or file new ones had expired by limitation,

while, if any inadequacy existed (which it did not), it was apparent when Petitioner's complaint was filed in the Court below (October 20, 1964), and Petitioner's right to amend or file new claims did not expire until July 31, 1966 (two years after the tax sued for was paid); and the first suggestion of inadequacy was not made until after the case was argued in the Circuit Court in January, 1970.

Truly, this situation presents, both as to the Defendant and the Court below, "irregularities in practice which should be corrected."

2. Unless the wholly erroneous statement in Footnote 8 to the Circuit Court's original opinion (App. 48) can be so considered, that Court made no holding upon Petitioner's principal contention: that, under Sec. 642(c) I.R.C. of 1954 Estate was entitled to deduct a sufficient amount of its gross income to offset its taxable income for each of the two fiscal years calculated without allowance for the charitable deductions. Nevertheless, since all facts bearing upon the question were stipulated as found by the trial Court and the question was properly presented to the trial and Circuit Courts, the result is the same as if the Circuit Court had expressly held against Petitioner. This directly conflicts with the Circuit Court's own decisions, as well as those of other Circuit Courts.

Therefore, this resulting conflict supports and requires favorable action on this petition. *A fortiori* is this correct if the aforesaid footnote is considered a holding by the Circuit Court adverse to Petitioner on this point.

It is established by all the authorities which have dealt with the question that in this case the "governing instrument," as that term is used in Section 642 (c), was Richardson's will. Examples are *Bowers v. Slocum* (CA 2, 1927), 20 F. 2d 350; *Commissioner v. Citizens & Southern Natl. Bank* (CA 5, 1945), 147 F. 2d 977; and *Sence v. U. S.* (Ct. Cl. 1968), 394 F. 2d 842.

The will specifically provided that all income received or accrued to the Estate during administration was to go to Petitioner, and the provision placing the entire burden of debts, etc. upon the residue was separate and apart from the provision.

Specific legacies were satisfied with property and a small amount of the cash on hand at Richardson's death. No income went to these legatees. (App. 29)

The administration was properly conducted and no funds were used, other than to pay upon death duties, debts, proper expenses of conserving the estate, and administration expenses. (App. 28-9)

No distribution was made to Petitioner until January 1, 1962 when all properties then held by the executors were delivered to Petitioner, subject to unpaid obligations, which consisted largely of then unpaid death duties which were satisfied with a contemporaneous loan to Petitioner of $30,000,000.

Until that time, the executors were clearly charged with conserving the properties making up the residue of the Estate which then belonged to Petitioner, and of paying, to the extent of available funds, the charges which constituted a prior claim upon that residue.

Just as would be the case if the residue bequeathed to Petitioner had been in its hands during the two tax years here involved and available funds had been used to pay liens upon the properties, the use by the executors of available funds to satisfy pro tanto existing liens and charges constituted a "use for exclusively * * * charitable * * * purposes" within the purview of Section 642(c), requiring that Estate be allowed as charitable deductions such part of its gross income for the respective years as was necessary to absorb its taxable income calculated without allowance for charitable deductions.

The term "gross income," as used in Section 642(c) means gross income as defined in the I. R. C. of 1954. *Estate of Robt. L. Clymer v. C. I. R.* (CA 3, 1955), 221 F. 2d 680. The principal elements making up statutory gross income are set out in Section 61, IRC of 1954. Page 24-5, supra.

The Estate's stipulated gross income was over $15,000,000 for fiscal 1960 and over $17,000,000 for fiscal 1961, while only an increase in the allowed charitable deduction of $434,025.90 for fiscal 1960 and $300,466.14 for fiscal 1961 was required to absorb all taxable income for those years.

Leading authorities, and we know of no conflicting ones, hold that it is not what executors do with respect to an estate, but what the governing instrument (in this case, Richardson's will) directs and requires them to do which controls an estate's right to a charitable deduction. Examples are: *Bowers v. Slocum* (CA 2, 1927), 20 F. 2d 350; and *Commissioner v. Citizens & Southern Natl. Bank* (CA 5, 1945), 147 F. 2d 977.

So, when the conduct of the executors was entirely proper, and the governing instrument required that everything which came into their hands except specific legacies go to Petitioner, and it did so go, the denial of the charitable deduction claimed is wholly erroneous and the holding conflicts with the cited cases and many others.

3. The questions presented are of great importance to taxpayers generally and to those charged with the duty of administering Federal tax laws. Every tax refund case must be based upon a claim for refund. (App. 52) This applies not only to income, but to estate, gift, excise, and other taxes, and a substantial part of the litigation which reaches United States District Courts and the Court of Claims is made up of suits for the refund of Federal taxes paid. A holding that the United States can, after litigating in a trial and appellate court the merits of a question and after a taxpayer's right to amend a refund claim or to file a new claim has expired, raise a question as to the adequacy of the refund claim is not only grossly unfair, but is an invitation to those who represent the government in such litigation to lay "traps for the unwary" and thereby deprive taxpayers of any effective consideration of the merits of their refund claims.

4. The Petitioner's position is strengthened by the fact that a charitable organization will suffer by the denial of its refund claims, and this despite the fact that this Court has held on numerous occasions that the Congress has repeatedly shown its intention to encourage charity and to resolve doubts in favor of charitable organizations and charitable gifts. Cf.

Helvering v. Bliss, 293 U.S. 144, where this Court said at Page 151:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

And *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 301 U.S. 379, 384:

> "Congress sought to encourage donations out of gross income, and we find no reason for saying that it intended to limit the exemption to sums which the trust could show were actually paid out of receipts during a particular year."

See also *United States v. Providence Trust Co.*, 291 U.S. 272.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

.....
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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of January, 1971, copies of this Petition for Writ of Certiorari have been served on Respondent's attorney in envelope with sufficient postage prepaid and properly addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Harry C. Weeks
Attorney for Petitioner

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OPINION OF THE TRIAL COURT

Sid W. Richardson Foundation brought this suit to recover a total of $769,711.48 income taxes and interest assessed against and paid by it for the fiscal years ended September 30, 1960, and September 30, 1961, as the transferee of the residuary assets of the estate of Sid W. Richardson, deceased.

All prerequisites for the maintenance of this action have been met, and the Court has jurisdiction under 28 U.S.C.A., Sec. 1346(a)(1).

The following designations will be used herein: "Foundation" for Sid W. Richardson Foundation; "Estate" for estate of Sid W. Richardson, deceased; "Richardson" for Sid W. Richardson; "Richardson Oils" for Richardson Oils, Inc.; "1954 Code" for Internal Revenue Code of 1954; "the will" for the will and codicil probated as the last will and testament of Sid W. Richardson.

The controlling facts are undisputed. They were established by admissions in the pleadings and the pretrial order, by oral testimony given by one witness in person and another by deposition, and by documentary evidence and a lengthy written stipulation. Each of the two witnesses was credible, and the Court believed their testimony as to all of the factual matters within their knowledge. All of the established facts have been taken into consideration in reaching the decision in this case, regardless of whether they are expressly included herein.

The following outline of the issues and the ultimate

facts will help to understand the later detailed discussion:

1. Pursuant to Section 642(c) of the Internal Revenue Code of 1954, the Estate, in computing its taxable income, was entitled to a charitable deduction for any amount of its gross income, without limitation, which, pursuant to the terms of the Richardson will, was permanently set aside, paid or used for charitable purposes.

2. All of the income of the Estate was so set aside or used by virtue of the provision of the Richardson will specifying that it should be included in the residue bequeathed and devised to the Foundation.

3. The Foundation was a non-profit, charitable corporation exempt from federal income taxes, and was a qualified devisee, legatee and beneficiary within the meaning of Section 642(c).

4. The Estate owned all of the capital stock of Richardson Oils, a qualified small business corporation under Subchapter S of the 1954 Code (26 U.S.C.A., Sections 1371-1377). Those statutes permit the shareholders of a closely held corporation qualified under them to avoid the normal income tax and surtax levied on corporations by reporting as part of their own gross income their respective proportionate shares of the taxable income of the corporation, whether distributed or not. Richardson Oils was therefore not required to pay federal income tax. The Estate, as owner of all the stock of the corporation, included all of the normally taxable income of the

income tax returns for the two fiscal years here involved, even though some of that income in each year was not distributed to or received by the Estate.

5. The Estate, using an accrual method of accounting, also treated all of the undistributed net income of Richardson Oils as having accrued to it generally in each of its taxable years ended September 30, 1960, and September 30, 1961, respectively, without any action on the part of Richardson Oils authorizing a dividend or a distribution as to such amounts. Under the theory that the provisions of the will set aside all of its gross income for charitable purposes under Section 642(c), the Estate took a charitable deduction equal to the sum of its gross income each year. Those deductions included the amounts of the undistributed income of Richardson Oils. As a result of the charitable deductions, the income tax returns for each year showed no tax due.

6. The IRS examined the returns of the Estate for the two years in question after it had been closed and its residue had been received by the Foundation, and determined deficiencies for both years. In its computation of the allowable charitable deduction for the Estate in each year, the IRS eliminated therefrom an amount equivalent to the undistributed income of Richardson Oils which the Estate had treated as having accrued to it for all purposes. That resulted in the deficiencies and assessments here involved.

The plaintiff challenges generally the method of computation used by the Commissioner in determining its net taxable income. In addition, it specifically

takes issue with the elimination from its charitable deductions of amounts equivalent to the undistributed income of Richardson Oils. It says that the qualification of Richardson Oils under Subchapter S entitled the Estate to treat the undistributed corporate income as part of its own gross income not only for income tax purposes, but for all purposes generally. It is unnecessary to discuss the general method of computation, as the plaintiff is not entitled to recover if the inclusion of such undistributed taxable income in its charitable deductions was properly disallowed.

The government says that the Estate was not entitled to charitable deductions for the amounts of undistributed income of Richardson Oils in question because such income was never distributed to or received by the Estate. It says that such income became only a fictional part of the Estate's gross income for the limited purpose provided in Subchapter S, rather than for general purposes, and that it was therefore never subject to the provisions of the will. It argues that the plaintiff's position cannot be sustained without ignoring the corporate entity of Richardson Oils.

The Court is of the opinion that the deductions in question were properly disallowed.

The evidentiary basis for the above contentions and conclusory statements appears in the detailed summary of the facts which follows.

At all times involved herein, the Foundation has been operated exclusively for religious, charitable and educational purposes, and has been exempt from income taxes under Sec. 501(c)(3) of the 1954 Code.

It is admitted that it was a qualified donee, devisee, legatee or beneficiary within the meaning of Sec. 642(c) of the Code.

Richardson, a long time resident of Fort Worth, died unexpectedly and while in apparent good health on September 20, 1959. He was then engaged in various and extensive business enterprises, individually, in partnerships, and as either the controlling or the sole stockholder in closely held corporations. Those ventures included the exploration for oil and gas, the development of oil and gas properties, the production and refining of oil and gas, ranching, mining, and exploiting patents. Richardson was active in the conduct and management of those businesses at the time of his death.

Richardson's last will and testament, consisting of the will itself and one codicil thereto, was admitted to probate in Tarrant County, Texas. Perry R. Bass, John B. Connally and Howell E. Smith were named as independent executors. They duly qualified as such on October 19, 1959, and acted in that capacity at all pertinent times.

The will made specific bequests totalling about $14,000,000.00 to eight relatives and one employee. Under the terms of the will, it was within the discretion of the executors to satisfy all of the general bequests either in money or in property, except $105,000.00 and a monthly payment of $1,000.00 to a sister for life, charged upon the corpus. The residue of the estate, subject to the charge of the $1,000.00 per month payable to the sister, was left to the Foun-

dation. In that connection, the will specifically provided: ". . . There shall be included in the residue of my estate disposed of hereby all the income, if any, received by or accrued to my estate during the administration thereof . . ."

At the time of his death, Richardson had properties on hand valued at approximately $92,000,000.00. $2,937,292.86 of that was cash. He was indebted individually and as a partner, endorser or guarantor for about $29,000,000.00. In addition to his debts, the death duties amounted to some $43,000,000.00.

The executors duly adopted on behalf of the Estate, for accounting and income tax purposes, a fiscal year ending September 30th and the accrual method of accounting. The propriety of those methods has not been questioned, and they were consistently followed during the period of the administration.

The executors determined in good faith and justifiably that the bulk of the assets of the Estate could not be liquidated within a short time without excessive sacrifice. The general policies followed in their administration of the estate were:

(a) Various properties were sold, with a cash realization of several million dollars, at times when the sales could be prudently made.

(b) Efforts to expand or increase activities with reference to the Estate holdings were immediately discontinued, but commitments made and projects not completed during Richardson's lifetime were consummated.

(c) Payments were made on debts of the Estate and on death duties, and steps were taken so that federal estate taxes not paid within 15 months from September 30, 1959, could be paid in installments.

(d) Specific bequests were satisfied in full before January 1, 1962, except for the unmatured portion of the $1,000.00 monthly payment due the Richardson sister during her lifetime. All of such bequests, except $256,060.36, were satisfied by delivering property specially devised or by transferring property of the Estate to the beneficiaries. None of the income of the Estate was used for such purposes.

Effective January 1, 1962, all of the remaining assets of the Estate were transferred, conveyed and delivered to the Foundation as the residuary legatee and beneficiary under the will, subject to all the unsatisfied obligations of the Estate. Those assets included $3,786,273.50 in cash. The Foundation borrowed $30,000,000.00 and paid off the balance due on the death duties. The $30,000,000.00 loan and all other remaining obligations of the Estate were paid by the Foundation through money realized from the management and operation of the residue so received.

At the time of his death, Richardson owned all of the capital stock of Richardson Oils. That stock, except for the 160 shares redeemed as hereinafter set out, passed to and remained in the possession and control of the executors as part of the property of the Estate during the entire period of administration. It was a part of the residue which was transferred and delivered to the Foundation as of January 1, 1962.

Thereafter, the stock continued in the possession, control and ownership of the Foundation.

Richardson Oils had its home office in Fort Worth. It was engaged in the business of developing oil and gas properties and producing oil and gas. Most of the Estate's oil properties, other than non-operating interests, including those received by it upon the liquidation of several partnerships in which Richardson had an interest, were transferred by it to Richardson Oils, subject to reserved oil payments. Such oil payments were subsequently transferred by the Estate to the Foundation.

Richardson Oils and the Estate duly elected under the provisions of Section 1372 of the 1954 Code for Richardson Oils to be treated, for income tax purposes, as a small business corporation within the purview of Subchapter S, Sections 1371-1377, both inclusive, of the Code. Those elections were in full force and effect during the entire period of the administration of the Estate. While Richardson Oils, as such a qualified small business corporation, had to file a federal income tax return for its taxable years, it did not have to pay any income tax. The Estate, as the sole shareholder of Richardson Oils, was permitted to include in its own gross income the amount of the taxable income of such corporation, whether distributed or not.

The fiscal year adopted and being used by Richardson Oils for accounting and income tax purposes at all pertinent times ended on October 31, a month later than that of the Estate.

The amounts of the taxable income of Richardson

Oils and of its distributions and dividends to the Estate for the periods in question are summarized as follows:

Taxable Income

For the fiscal year ended 10/31/60 .....$ 492,016.18
For the fiscal year ended 10/31/61 ..... 1,229,988.20

Those amounts were carried on the books of the Estate as having accrued to it as part of its gross income, not only for Subchapter S tax purposes, but for all purposes generally attributable to an accrued item. As part of such gross income, they were included in the charitable deductions of the Estate in the fiscal years applicable to them.

Distributions and Dividends

For the fiscal year ended 10/31/60 .....$2,540,000.00
For the fiscal year ended 10/31/60 ..... 925,000.00
For the fiscal year ended 10/31/61 ..... 2,300,000.00

The $2,540,000.00 distribution was made on September 30, 1960, the last day of a fiscal year of the Estate. It had no relation to income. It consisted of corporate properties valued at that amount transferred and conveyed to the Estate in redemption of part (160 shares) of the Richardson Oils capital stock owned by the Estate. In its examination of the income tax returns of the Estate, the Commissioner treated the $2,540,000.00 as a dividend received by the Estate in its fiscal year ended September 30, 1960.

The $925,000.00 was a cash dividend declared on October 18, 1960, payable by the end of that month.

The liability to the Estate for it was discharged during the month of October, 1960, by the cancellation of a total indebtedness of $925,000.00 then owing Richardson Oils on account of advances theretofore made by it to Richardson during his lifetime and to the Estate during an earlier period of its administration. The Commissioner recognized this $925,000.00 as a cash dividend, and deducted it from the $1,229,988.20 taxable income to get the amount of $304,988.20, which it treated as undistributed taxable income of Richardson Oils for the year ended October 31, 1960. That date would make it applicable to the Estate's fiscal year ended September 30, 1961. The cash dividend of $2,300,000.00 is not material to the issues in this case because it was paid on October 18, 1961, after the ending date of the last fiscal year of the Estate here involved.

The gross income of the Estate for its fiscal year ended September 30, 1960, was $15,673,905.55, and for its fiscal year ended September 30, 1961, was $17,837,874.33. No part of the revenues received by the Estate during those fiscal years was used for any purpose other than operation, maintenance and protection of the properties of the Estate, and payment of debts and taxes, including death duties, and expenses of administration.

Income tax returns were duly filed for the Estate for its two fiscal years in question. Each of the returns showed substantial amounts of gross income, as well as net income before any deduction for charitable contributions. The charitable deduction taken in each

year under Section 642(c) and the $600.00 statutory exemption exceeded the amount of the net income, so no tax liability was shown on either of the returns. The deductions were taken in good faith.

The amounts of the undistributed net taxable income of Richardson Oils included in the income tax returns of the Estate, both for Subchapter S purposes and as part of the gross income comprised in the charitable deduction under Section 642(c), were $492,016.18 for the Estate's fiscal year ended September 30, 1960, and $300,466.14 for the year ended September 20, 1961.

The IRS examined the returns of the Estate for the years in question after the residue had been delivered to the Foundation. It determined that the Estate had a net taxable income of $483,425.90 for the fiscal year ended September 30, 1960, and of $299,816.14 for the one ended on September 30, 1961. The amount of the income tax deficiency for the first year was determined to be $411,461.55, and for the second year, $234,906.92. The taxing authorities disallowed the inclusion in the Estate's charitable deductions of the amounts of the undistributable income of Richardson Oils.[1] Except for such exclusions, there would have been no tax liability in either year.

The net value of the residue received by the Foundation from the Estate was far in excess of the income tax claims, and the Foundation, as the transferee of the Estate, was liable for the deficiencies. The Commissioner therefore assessed the Foundation $498,950.68 ($411,461.55 tax and $87,489.13 interest)

for the first year, and $270,760.80 ($234,906.92 tax and $35,853.88 interest) for the second year. The total amount of tax and interest due was thereupon paid by the Foundation.

The plaintiff argues that the undistributed income of Richardson Oils became a part of its gross income because it was on the accrual method of accounting and because Subchapter S of the Code authorized it. These grounds are not tenable, whether taken separately or together.

Richardson Oils, as a private corporation, was a legal entity in its own right. It did not owe the Estate a debt in the amount of its undistributed profits at any time, except to the extent that it declared a dividend. It was plowing back into the business the undistributed profits in question. How would the Estate be able to meet that situation under its accounting methods? Would it reduce the accrued account from day to day to adjust to the amount left on hand after paying expenses? The corporate entity of Richardson Oils would have to be completely ignored to say that its undistributed profits should have been considered an accrued asset of the Estate.

The purpose of Subchapter S is not to penalize taxpayers, but to give them a windfall. It provides a way that the shareholders of a qualified closely held corporation can save their company from having to pay the heavy income taxes and surtaxes imposed on corporations. Qualification under it is voluntary, not compulsory. All of the stockholders and the corporation itself must unanimously elect to qualify under the sub-

chapter. A method is provided whereby the election can be revoked and terminated at the end of a taxable year at the instance of the corporation or of any of its shareholders, including those who acquire stock subsequent to the election. The saving can be substantial, too. At the time here involved the normal tax and surtax on a corporation amounted to 52% of all its net income over $25,000.00. The term, "small business corporation", as used in the subchapter has reference to the small number of owners of the corporate stock, rather than the amount of the corporation's income. Richardson Oils, for instance, had an annual income in the multimillions, yet it could qualify as a "small business corporation" under these statutes. The language of the various sections of the subchapter makes it clear that this statutory fiction is only for the limited purposes of enabling certain taxpayers to take advantage of the windfall. Restrictive phrases such as similar to "for the purposes of this subchapter" appear throughout.

Richardson Oils had only one shareholder, but Subchapter S permits as many as ten stock owners in a corporation otherwise qualified. If the rule contended for here by the plaintiff were the law, it would apply to all qualified corporations, whether there happened to be one stock owner or any number of owners up to ten. It might be unlikely that any problems would arise from considering undistributed profits of a qualified corporation to have accrued to its only stockholder as part of his gross income for all purposes; but there could be unlimited trouble in the case of a corporation with several shareholders up to ten. The own-

ers of a majority of the stock might want to leave the profits in the corporation for growth purposes, and yet desire to take advantage of the tax saving. One or two minority stockholders might be persons who believe in spending money as fast as they can get it. Under the argument advanced by the plaintiff, an election to qualify such a corporation to lower taxes would result in making the undistributed profits subject to payment to the dissident minority. No such purpose was intended by Subchapter S. If there had been, there would have been no place for "undistributed taxable income", as found in Section 1373.

Cases where the same income was treated one way under fictional provisions of the tax statutes, without being regarded the same way generally, are not new. *Estate of Esposito v. Commissioner*, 40 T.C. 459; *Freund's Estate v. Commissioner*, 2 Cir., 303 F. 2d 30 (1962). In this connection, the Court in the *Freund* case said a p. 32:

> "From these fictional provisions relating to accounting it does not follow, as appellants contend, that income never received by the decedent's estate, although it must be reported by the estate as gross income, must also be treated as 'paid or permanently set aside' for charity under the terms of the decedent's will, and so entitled to the deduction permitted under Section 642(c)."

The undistributed income of Richardson Oils had to become subject to the charitable provisions of the Richardson will before it could be included in the Estate's charitable deduction under Section 642(c). That was the only way in this case it could be dedi-

cated to charity. The portion of that statute pertinent here reads:

> "In the case of an estate or trust . . . there shall be allowed as a deduction in computing its taxable income . . . any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes . . ." (Section 642(c), 1954 Code, 26 U.S.C.A., Sec. 642(c).

The Richardson will is the "governing instrument", as that term is used in the above quotation. The propriety of the charitable deductions claimed by the Estate must be determined from the provisions of the governing instrument, rather than from the acts of the executors. J. B. Whitehead, 3 T.C. 40 (1944), affirmed, sub. nom.; *Commissioner v. Citizens' Southern National Bank*, 5 Cir., 142 F. 2d 977 (1945); *Bowers v. Slocum*, 2 Cir., 20 F. 2d 350 (1927); *Egan v. Commissioner*, 5 Cir., 43 F. 2d 881 (1930). The capital stock of Richardson Oils came within the control of the provisions of the will, but the corporation's undistributed profits did not. Until a dividend was declared, the corporation had the right to use those profits in any legitimate way it saw fit, without regard to the provisions of the will which governed the Estate. Under those circumstances, Sec. 642(c) did not become applicable to such undistributed profits.

Since the charitable deductions in question were

properly disallowed, judgment will be entered for the defendant.

This opinion will serve as findings of fact and conclusions of law under Rule 52(a), F.R.Civ.P.

Signed this 31st day of March, 1969.

/s/ Leo Brewster
JUDGE

FOOTNOTES

[1]The following, taken from paragraph X. of the written stipulation, shows how the taxing authorities arrived at the amounts of the charitable deductions allowable to the Estate:

A

Fiscal Year Ended September 30, 1960

Net operating income as per Exhibit 3			$1,316,059.88
Less: ½ capital gain included in Estate return		303,339.40	
Less: Portion applicable to undistributed taxable income from Richardson Oils, Inc.	492,016.18		
Less: ½ of capital gains included in Richardson Oils, Inc. income	7,990.28	484,025.90	787,365.30
Amount treated as charitable deduction			$ 528,694.58

If the $434,025.90 amount shown above had not been deducted in the above calculation, the charitable deduction would have equaled the net income before deducting the charitable deduction.

B

Fiscal Year Ended September 30, 1961

Net operating income as per Exhibit 4			$8,490,183.19
Less: ½ capital gain included in Estate return		706,955.31	
Less: Portion applicable to undistributed taxable income from Richardson Oils, Inc.	1,229,988.20		
Less: Cash dividend	925,000.00		
	304,988.20		
Less: Portion of ½ capital gain deduction applicable to undistributed income	4,522.06	300,466.14	1,007,421.45
Amount treated as charitable deduction			$7,482,761.74

If the $300,466.14 shown above had not been deducted in the above calculation, the charitable deduction would have equaled the net income before deducting the charitable deduction.

OPINION OF CIRCUIT COURT ON FIRST PETITION FOR REHEARING

Appeal from the United States District Court for the Northern District of Texas

(June 23, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

GEWIN, Circuit Judge: The Sid W. Richardson Foundation (Foundation) initiated this suit to recover $769,711.48 in income taxes and interest paid by it as transferee of the estate of Sid W. Richardson (Estate) for fiscal years ended September 30, 1960 and September 30, 1961. The sole question presented by the Foundation in its claim for refund, and considered by the district court, was whether the Estate was entitled to deduct from income, as charitable contributions under § 642(c) I.R.C. of 1954,[1] amounts representing undistributed income of Richardson Oils (Oils), a Subchapter S Corporation. The district court disallowed the deduction.

On this appeal the Foundation advances two contentions. First, it challenges the district court's decision disallowing the above-mentioned deduction. Second, it argues that the Estate was entitled to a 642(c) charitable deduction equivalent to its total gross income for the years in question. The Foundation's initial contention is without merit and its second contention is not properly before this court. Accordingly, we find no er-

[1]Unless otherwise designated sectional references are to the Internal Revenue Code of 1954.

ror in the well-reasoned opinion of the district court and affirm.[1]

At the time of his death in 1959, Sid W. Richardson was the sole owner of the capital stock of Oils. All of his stock, except for 160 shares which were redeemed, passed to and remained in the possession and control of the executors as part of the Estate property during the entire period of administration. Oils, with the consent of the Estate, duly elected pursuant to the provisions of § 1372 to be treated as a Subchapter S corporation within the purview of §§ 1371-1377. Thus, Oils did not have to pay any income tax during the period of administration. As Oils' sole shareholder, the Estate included in its gross income the amount of Oils' taxable income whether distributed or not.

Richardson's will (Will) provided that all of the income of the Estate which accrued during its administration would be included in the residue of his estate. The following residuary clause governed the final distribution of this income:

> I give devise and bequeath . . . all of the residue of my estate wherever situated which shall remain after the payment of debts and obligations, taxes and similar charges, the expenses of administering my estate and the satisfaction of the bequests and devises made in Article III hereof, to SID W. RICHARDSON FOUNDATION . . . .

All of the specific bequests in the Will were satisfied

[1] *Sid Richardson Foundation v. United States*, 306 F.Supp. 755 (N.D. Tex. 1969). Because the facts are not in dispute, we have outlined only certain pertinent facts in this opinion. A full statement of the facts appears in the district court's opinion.

in property except for $256,060.36 and a monthly provision for a sister payable out of corpus. None of the Estate's income was used to pay cash bequests. The residue of the Estate, including all outstanding capital stock of Oils and all income was transferred to the Foundation as of January 1, 1962.

Oils had a net taxable income of $492,016.18 for its fiscal year ending October 31, 1959 and $1,229,988.20 for the year ending October 31, 1960. Those amounts were carried on the Estate's books as having accrued to it as part of its gross income, not only for Subchapter S tax purposes, but for all purposes generally attributable to an accrued item. As part of the Estate's gross income, they were included in the 642(c) charitable deductions of the Estate in the fiscal years applicable to them. The amounts of *undistributed* net taxable income of Oils which were included in the income tax returns of the Estate were $492,016.18 for Estate's fiscal year ended September 30, 1960 and $300,466.14 for the year ended September 30, 1961. After the residue had been delivered to the Foundation, the IRS examined the Estate's returns and determined that these latter amounts, representing undistributed taxable income of Oils, were improperly included in the charitable deduction because such amounts were never distributed to or received by the Estate and thus were never subject to the provisions of the will. Thus, it concluded that the Estate had a net taxable income of $483,425.90 for 1960 and $299,816.14 for 1961. It is unnecessary to discuss the general method of computation since the Foundation is not entitled to recover if the inclusion of the

undistributed taxable income of Olis was properly disallowed. The amount of the income tax deficiency for the first year was determined to be $411,461.55 (plus interest of $87,489.13) and $234,906.92 (plus interest of $35,853.38) for the second year. The total amount of the tax and interest was paid by the Foundation and this suit was instituted to recover the payment.

Section 642(c) provides, in pertinent part:

> In the case of an estate or trust . . . there shall be allowed as a deduction in computing its taxable income . . . any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . .

Thus, to qualify for the charitable deduction, the amount here in question must have been (1) part of the Estate's gross income, and (2) pursuant to the terms of the governing instrument (here the Will) must have been (3) paid or permanently set aside or properly designated to be used exclusively for legitimate charitable purposes.

In considering the Foundation's contentions it is important to understand *in fact* the undistributed income at issue never left the coffers of the Subchapter S corporation. Undaunted by this apparently insurmountable obstacle, the Foundation doggedly insists that the amounts in question have met the require-

ments of 642(c) and that the Estate is entitled to the claimed deduction. The Foundation explains that because Oils was a Subchapter S corporation, its undistributed income was a part of the Estate's gross income; and, under the terms of the Will, all of the income of the Estate was set aside for and "actually" did go to the Foundation, a charitable institution. Thus, it concludes that the requirements of § 642(c) have been met and the Estate is entitled to the deduction.

We must reject this conjuration on two grounds. First, the undistributed income of Oils was never subject to the charitable provisions of the Will. Second, the amounts in question were not paid or permanently set aside or otherwise properly designated for charitable purposes.

Although the undistributed income of Oils was considered in computing the gross income of the Estate, it was never a part of the Estate; it never came within the dominion and control of the executors as distinguished from the corporate entity; and it was never subject to the charitable provisions of decedent's Will. The Foundation's argument assumes that because the undistributed income of Oils was included in computing the Estate's gross income, it actually became a part of the Estate and was subject to the terms of the Will. We find no support for such an assumption.

A similar argument was rejected by the Second Circuit in *Freund's Estate v. Commissioner*,[9] where the taxpayer died owning an interest in a law partner-

[9] 303 F.2d 30 (2d Cir. 1962).

ship. His will provided that the remainder of his estate should be held in trust, the income to be paid to his surviving sister during her life, and the principal, upon her death, to be paid to Harvard College. Under § 126(a) of the 1939 Code, the entire amount of Mr. Freund's share of the 1954 partnership income was includible in the estate's income. Freund's share of partnership income for 1954 was approximately $35,000. However, the Estate actually received only about $12,000, the balance of approximately $23,000 having been withdrawn by Freund prior to his death. The estate, clearly entitled to a $12,000 charitable deduction under 642(c), claimed an additional $23,000 charitable deduction. In refusing to permit such a deduction, the court stated:

> For accounting purposes Section 126(a) and its corresponding section in the 1954 code, Section 691(a), employ a fiction in order to transfer the tax burden resulting from "bunching" income in the year of death from the decedent to his estate, while making sure that the amount is taxed to someone.
>
> From these fictional provisions relating to accounting it does not follow, as appellants contend, that income never received by the decedent's estate, although it must be reported by the estate as gross income, must also be treated as "paid or permanently set aside" for charity under the terms of the decedent's will, and so entitled to the deduction permitted under Section 642 . . . The will left to charity the residual estate. Plainly, even by the terms of the will, the residuum could not include moneys already expended by the decedent. Yet it is precisely such an impos-

sible construction that the petitioners would have us adopt.'

"Precisely such an impossible construction" is urged upon this court by Foundation. The residuary clause of Richardson's Will left the residuum of the Estate to the Foundation. It could have no effect on moneys held by Oils although such amounts were included in computing the Estate's gross income.

The same conclusion was reached in *Esposito v. Commissioner*[5] where decedent devised the residue of his estate to nine charities. The principal asset of his estate was all of the stock in Jarie Corporation, which was considered a personal holding company for tax purposes. Decedent's estate filed a consent to be taxed as if it had received a dividend from Jarie for the taxable year in issue. The estate claimed a charitable deduction under the provisions of § 642(c) for the amount of the consent dividend. The Tax Court properly disallowed such a deduction because the fictional amount included in computing the estate's income was never received by the estate and never paid or permanently set aside for legitimate charitable purposes.

The Foundation attempts to distinguish *Freund* and *Esposito* by arguing that in the instant case, the funds in question were "actually distributed by Oils to the Estate in the two years involved, all of which was under the complete control of the executors, who were required to see, and did see, that it went with the resi-

[4] *Id.* at 32.
[5] 40 T.C. 459 (1963).

due of the remainder to Foundation." This argument grossly misstates the facts. It could only be correct if the corporate existence of Oils were totally ignored. The Foundation supports its position by explaining that all of the *stock* of Oils was part of the corpus of the Estate and was duly transferred to the Foundation. In essence, the Foundation is arguing that ownership of the stock is ownership of the income and transfer of the stock is transfer of the income. The Foundation erroneously disregards the fact that Oils is a separate entity, and as such the undistributed profits could be used by Oils in any legitimate way it saw fit. The rule is well-settled that the fact that taxpayers exercised complete dominion and control over the corporation, were in charge of its administration and management, and fully directed its policies, does not justify disregarding the corporate entity for tax purposes.[6] The district court correctly rejected Foundation's claimed deduction for amounts equivalent to the undistributed income of Oils.[7]

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[6] *National Carbide v. Commissioner*, 336 U.S. 422 (1949); *Skarda v. Commissioner*, 250 F.2d 429 (10th Cir. 1957). One of the more perplexing aspects of this case is that the Foundation never argued that the corporate entity should be disregarded; such an argument would seem to be logically necessary to support its contention that the amount in question "actually" went to the Foundation. In any event, the above cited authorities seem conclusive on this point.

[7] See the district court's opinion, 306 F. Supp. at 761. The court correctly and cogently concluded:

> The capital stock of Richardson Oils came within the control of the provisions of the will, but the corporation's undistributed profits did not. Until a dividend was declared, the corporation had the right to use those profits in any legitimate way it saw fit, without regard to the provisions of the will which governed the Estate. Under those circumstances, Sec. 642(c) did not become applicable to such undistributed profits.

306 F.Supp. at 762.

The Foundation's second ground for recovery, that the Estate is entitled to a charitable deduction equivalent to its gross income, is improperly advanced in this court.[8] We stated in *Carmack v. Scofield:*

> A taxpayer is not permitted to advance one ground for refund in his claim filed with the Commissioner and thereafter rely upon an entirely different ground in a subsequent suit for refund, but is confined to the scope of the grounds for refund asserted in his claim filed with the Commissioner.[9]

Our position was reaffirmed in *Alabama By-Products v. Patterson:*

> All grounds upon which a taxpayer relies must be stated in the original claim for refund so as to apprise the Commissioner of what to look into; the Commissioner can take the claim at its face value and examine only those points to which his attention is necessarily directed. . . . Anything not raised at that time cannot be raised later in a suit for refund.[10]

The Foundation limited its claim for refund to the Subchapter S question with the following language:

> While the examining officer admits that the taxpayer is entitled to an unlimited charitable deduction under Section 641(c) [sic] I R C of

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[8] If we reached this question, we seriously doubt that the Foundation's argument could be accepted. It insists again on deductions for amounts never received by the Estate and never designated for charitable uses.

[9] 201 F.2d 360, 362 (5th Cir. 1953).

[10] *Alabama By-Products v. Patterson*, 258 F.2d 892, 900 (5th Cir. 1958), *cert. denied*, 358 U.S. 930 (1959); See *Real Estate Title Co. v. United States*, 309 U.S. 13 (1940); *United States v. Garbutt Oil Co.*, 302 U.S. 528 (1938).

1954, he makes the following statement:

> "All income, with the exception of the Subchapter S income from Richardson Oils, Inc., which represents the undistributable taxable income of such corporation, has been allowed as a charitable deduction for the reasons set out in this report."

So, in essence, the deficiencies in income tax proposed against the taxpayer in the examining officer's report are based upon what he determines to be the undistributed Subchapter S income of Richardson Oils, Inc. included in its tax returns for the respective periods. It appears that the correctness of this action is the *only* issue involved. [Emphasis added]

The Foundation's arguments to the contrary are refuted, in our opinion, by this explicit, unequivocal language.

AFFIRMED.

PER CURIAM OPINION OF THE CIRCUIT COURT ON PETITION FOR REHEARING

(August 17, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

PER CURIAM: In its petition for rehearing the taxpayer calls to our attention the fact that we quoted from a protest letter filed with the District Director of Internal Revenue, but stated that the quotation came from its claim for refund. We now quote from the claim for refund:

> Sid W. Richardson Foundation (a Texas non-profit corporation) is the transferee of the estate of Sid W. Richardson, deceased, and paid the tax and interest shown above. By virtue of Section 642(c), IRC of 1954, and the will of said decedent, said estate was entitled to an unlimited charitable deduction in computing its income tax liability for its fiscal year ended September 30, 1960, in an amount not in excess of its gross income for said period, which gross income exceeded its net income, and owed no income tax for said period. This unlimited charitable deduction was improperly limited in determining the deficiency so illegally assessed against said taxpayer and transferee. See the income return of the Estate of S. W. Richardson, Dec'd., for said period, the report thereon of Internal Revenue Agent Raymond F. Kelly dated 5/16/63, the protest thereto of said Estate dated 7/8/63, and the certified copy of the will of said decedent S. W. Richardson (heretofore filed with the

I. R. S.), all of which are incorporated herein by reference.[1]

The quoted language from the claim for refund does not change the conclusion reached in our opinion. The entire record strongly indicates that the theory of the taxpayer's claim for refund was based upon its contention that the undistributed Subchapter S income of Richardson Oils was a part of the estate as distinguished from the corporate entity. Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the court. We adhere to the conclusion reached that the undistributed income of Oils was never a part of the estate and that the Foundation is not entitled to deduct from income, as charitable contributions under § 642(c) IRC of 1954, amounts representing undistributed income of the Subchapter S corporation.

The petition for rehearing is DENIED.

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[1]There were two claims for refund, one for the year 1960 and one for the year 1961. It should be noted that the claims for refund incorporate by reference, (a) "the income return" of the Estate of S. W. Richardson, deceased; (b) the report thereon of the Revenue Agent; (c) "the protest thereto of said estate dated 7/8/63", and (d) the certified copy of the will of the decedent.

The language quoted in this court's opinion is from the protest letter, but that letter was part of the claim for refund since it was incorporated therein. The language is considered to be entirely pertinent because it sets forth the underlying basis of the claim and in effect restricts the issue to the Subchapter S income. The same may also be said with respect to the income tax returns and the revenue agent's report which were likewise incorporated by reference in the claims for refund.

TREASURY REGULATIONS UNDER SECTION 642(c), IRC OF 1954

§ 1.642(c)-1. Charitable contributions deduction.—Any part of the gross income of an estate or trust which, by the terms of the will or of the instrument creating the trust:

(a) Is, during the taxable year, paid or permanently set aside for a purpose specified in section 170(c), relating to charitable contributions, or

(b) Is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit, is allowed as a deduction to the estate or trust in lieu of the deduction authorized by section 170(a). For this purpose, an amount received by an estate or trust which is includible in its gross income as income in respect of a decedent under section 691(a)(1) is deemed "gross income" of the estate or trust. In the case of a trust, the deduction otherwise allowable under section 642(c) and this section is subject to the limitations of section 681 (relating to unrelated business income and prohibited transactions). See section 681 and the regulations thereunder.

TREASURY REGULATIONS UNDER SECTION 7422, IRC OF 1954

§ 301.6402-2. Claims for credit or refund.—(a) *Requirement that claim be filed.* (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

(2) In the case of a claim filed prior to April 15, 1968, the claim together with appropriate supporting evidence shall be filed in the office of the internal revenue officer to whom the tax was paid or with the assistant regional commissioner (alcohol and tobacco tax) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of § 301.6091-1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim, together with appropriate supporting evidence, shall be filed (i) with the Director of International Operations if the tax was paid to him or (ii) with the assistant regional commissioner (alcohol and tobacco tax) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim with appropriate supporting evidence must be filed with the service center

serving the internal revenue district in which the tax was paid. As to interest in the case of credits or refunds, see section 6611. See section 7502 for provisions treating timely mailing as timely filing and section 7503 for time for filing claim when the last day falls on Saturday, Sunday, or legal holiday.

(b) *Grounds set forth in claim.* (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

(2) Neither the district director nor the director of the regional service center has authority to refund on equitable grounds penalties or other amounts legally collected.

LAST WILL AND TESTAMENT OF S. W. RICHARDSON

STATE OF TEXAS }
COUNTY OF TARRANT }

I, S. W. RICHARDSON (Sid W. Richardson), a bachelor of Fort Worth, Tarrant County, Texas, being of lawful age and of sound and disposing mind and memory, do hereby make, publish and declare the following to be my Last Will and Testament, hereby expressly revoking all Wills and Codicils by me at any time heretofore made.

ARTICLE I

1. I make, constitute and appoint my brother-in-law, Howell E. Smith, my nephew, Perry R. Bass, and John R. Connally Independent Executors of this, my Last Will and Testament, and all property belonging to my estate which is located in the State of Texas, or subject to the jurisdiction of said State, or which may be received by them from such ancillary administrations as may be had in other States where I may own property at my death. (I intend and direct that at all times the administration of my estate in Texas shall be, and shall be considered as the principal or domiciliary administration, and that any other administrative proceedings had in other States shall be and shall be considered as ancillary, and that all of the terms and provisions hereof, with respect to the administration of my Texas estate, and the rights, powers, duties and immunities of the Texas Executors shall extend and apply to all property and funds received by my Texas Executors from such ancillary

administrations as may be had in other States with respect to those portions of my estate located in other States or subject to the jurisdiction of other States). Should one of said Executors, for any reason, fail or refuse to qualify, or having qualified, should one of them become incapacitated, die, resign or be removed, then I direct that such vacancy be not filled, and a second vacancy so occurring shall not be filled if Perry R. Bass is the surviving or continuing Executor. If it occurs, because of death, incapacity, refusal to act, resignation or removal, or for any other reason, that Perry R. Bass is the only one of the three above named who is qualified and acting as an Executor, he shall continue to act as the sole Executor of this, my Last Will and Testament; but if, for any reason, none of the three individuals above named is qualified and acting, and only one, other than Perry R. Bass, is acting, then I make, constitute and appoint The Fort Worth National Bank, a National Banking Association with its office in Fort Worth, Texas, as the successor Independent-Co-executor or as sole successor Independent Executor of this, my Last Will and Testament, as the case may be.

2. As used herein, unless the context plainly requires a different meaning, the term "Executors" shall mean the individuals or institution at the time acting as Independent Executor or Independent Executors hereunder.

3. I expressly direct that no bond or security be required of my Executors, and that no action be had with respect to my estate in the Probate Court of

Terms to which this Will may come, other than to prove and record the same and to file therein an inventory and appraisement of my estate and a list of the claims due to and from my estate.

4. My Executors shall receive compensation for the service rendered by them as such at the rate provided by law; this compensation to be divided between Co-executors as they may in writing agree from time to time in advance. Each Executor shall be entitled to indemnification and reimbursement from my estate for all proper expenses and liabilities incurred by him as such Executor, and no Executor shall be liable for the default of another Executor, or otherwise than for his own misconduct or breach of trust.

5. I give and grant unto my Executors full power and authority to administer upon my estate and to carry out all of the instructions herein contained, and, during the period of administration, to conserve my estate and its values. Without in anywise limiting the generality of this grant of power, I expressly give and grant unto my Executors full power and authority:

(a) To sell for cash or on credit, or to exchange or partition any property belonging to my estate.

(b) To borrow money and give security therefor, to extend and renew any indebtedness due by my estate, and to continue in force any obligation that I may have such as surety, guarantor or endorser.

(c) To lease, let or rent any property belonging to my estate. Any lease or rental agreement made

by my Executors shall be valid according to its terms, even though it extends beyond the period of administration upon my estate. The power to lease so given includes the power to make oil, gas and mining leases.

(d) To settle, compromise and adjust claims against or in favor of my estate.

(e) To participate fully in all reorganizations of all corporations in which I may own stock or securities, or against which I may have claims.

(f) To continue any business or business enterprise in which I may be engaged at my death, including any partnership in which I may be interested.

(g) To organize one or more corporations to acquire property belonging to my estate and to accept for such property the stock and securities, either or both, of any such corporation for any property so acquired, and if this is done, the stock and securities, either or both, so acquired shall be treated and dealt with under all of the provisions of this Will as if I had owned such stock and securities, either or both, at my death.

(h) To dissolve and liquidate, or to participate in the dissolution and liquidation of any corporation in which I may own stock or securities at my death, and, if this power is exercised, the funds and property received by my Executors because of any such liquidation and dissolu-

tions shall be treated and dealt with under all of the provisions of this Will as if I had owned such funds or properties at my death.

(i) To arrange any property, holding or interest which I may own at my death, or which may be acquired by my estate during the period of administration thereon in such form as will cause the same to be acceptable and most beneficial to Sid W. Richardson Foundation, a charitable Texas corporation which will receive the bulk of my net estate hereunder and, specifically, so that, to the greatest extent practicable, said Foundation's receipt of income therefrom will impose upon it no income tax liability.

6. My Executors shall pay from my estate all estate, succession and inheritance taxes and charges which may be imposed upon or because of the passing of my estate at my death, or the receipt of any part thereof by the beneficiaries herein named, and this shall be done whether such taxes and charges are imposed by laws now in force or hereafter adopted, and this whether such taxes or charges are measured in whole or in part by property which is not a part of my estate for administrative purposes.

7. My Executors shall also pay from my estate all of the expenses of my last illness and funeral, as well as the cost and expenses of administering upon my estate; and, from my estate shall pay, or provide for the payment of, all of my just debts, with full power and discretion as to renewals and extensions of such

debts and transfers and allocations of property in consideration of the assumption of such debts, or any of them.

ARTICLE II

1. Whomsoever, whether one or more, of those named in Article I (1) hereof as Executors of my Texas estate who shall qualify as such Executor or Executors shall likewise be the Executor or Executors of all of my estate located in or subject to the jurisdiction of the State of Louisiana with full estate. Thereafter, if there is a change in the executorship of my Texas estate, as is provided for in Article I (1) hereof, a corresponding change shall be made in the Louisiana executorship, so that at all times my Texas Executor or Executors shall be and act as my Louisiana Executor or Executors. The bond or security required of my Louisiana Executor or Executors shall be the minimum permitted by the law of Louisiana then in force, and all premiums and expenses connected therewith shall be paid from my Louisiana estate. My Louisiana Executor or Executors are hereby authorized, empowered and directed to sell all of my estate located in or subject to the jurisdiction of the State of Louisiana at private sale in one sale of all of same, or two or more sales of parts thereof, as they may deem appropriate. After the payment of my Louisiana debts, if any, and the expenses of administering upon my Louisiana estate, the balance remaining shall be remitted to my Texas Executors, and the Louisiana administration shall then be closed. The remittances so made to my Texas Executors shall thereafter be treated as Texas property and be gov-

erned and controlled by the provisions hereof relative to the disposition of my Texas estate.

2. Whensoever, whether one or more, of those named in Article I (1) hereof as Executors of my Texas estate who shall qualify as such Executor or Executors shall likewise be the Executor or Executors of all of my estate located in or subject to the jurisdiction of the State of Mississippi. Thereafter, if there is a change in the executorship of my Texas estate, as is provided in Article I (1) hereof, a corresponding change shall be made in the Mississippi executorship, so that at all times my Texas Executor or Executors shall be and act as my Mississippi Executor or Executors. If the law of Mississippi then in force permit, no bond or security shall be required of my Mississippi Executors, and if bond or security is required by such law, it shall be the minimum permitted by such law and all premiums and expenses connected therewith shall be paid from my Mississippi estate. My Mississippi Executors are hereby authorized, empowered and directed to sell all of my estate located or subject to the jurisdiction of the State of Mississippi at private sale in one sale of all of same, or in two or more sales of parts thereof, as they may deem appropriate. After the payment of my Mississippi debts, if any, and the expenses of administering upon my Mississippi estate, the balance remaining shall be remitted to my Texas Executors and the Mississippi administration shall be closed. The remittances so made to my Texas Executors shall thereafter be treated as Texas property and be governed and controlled by the provisions hereof relative to the disposition of my Texas estate.

3. If at my death I own property in a State or States other than Texas, Louisiana and Mississippi, and it is necessary or appropriate that an ancillary administration be had in one or more States other than Texas, Louisiana and Mississippi, then I direct that each such additional ancillary administration be had, governed and controlled by the provisions of Article II (2) hereof, and that after each such ancillary administration is closed and the funds derived from such administration remitted to the Texas Executors, the amounts so remitted shall be treated as Texas property and be governed and controlled by the provisions hereof relative to the disposition of my Texas estate.

4. To the full extent that it is lawful for them so to do, those serving as ancillary Executors in States other than Texas may exercise in the respective administrations each and every power granted my Texas Executors by Article I hereof.

5. If either before or after it qualifies as the successor Co-Executor or as sole Executor hereunder The Fort Worth National Bank is reorganized or is merged into or consolidated with one or more banking institutions, then the bank resulting from such reorganization, merger or consolidation shall succeed to the Co-Executorship or sole Executorship as the case may be with exactly the same rights, powers, duties and immunities as are herein granted to or imposed upon The Fort Worth National Bank.

ARTICLE III

1. I give, devise and bequeath unto my niece, Nancy

Ann Kirkpatrick, my undivided one-half (½) interest in the real estate in Donley and Armstrong Counties, Texas, known as the "S. J. Ranch," in which real estate her father, Howell E. Smith, owns the other undivided one-half (½) interest. If at my death there is any indebtedness due with respect to my one-half interest in said real estate, then I direct my Executors to pay this indebtedness, or to provide for the payment of same as is herein directed with respect to the remainder of my indebtedness, so that my said niece may receive said interest free and clear of all liens and encumbrances.

2. I give in equal shares to such of the children of my nephew, Perry R. Bass, as may be living at my death the Island owned by me in the Gulf of Mexico adjacent to the Texas mainland known as "St Jose Island", together with all improvements thereon, the furnishings and equipment appurtenant thereto, as well as all livestock, boats, automotive equipment and supplies thereon at my death. (There is not included in the foregoing any interest which I may own at my death in offshore oil, gas or mineral leases or any oil and gas wells thereon). I also give in equal shares to such of the children of my nephew, Perry R. Bass, as may be living at my death all shares of the capital stock of Salt Water Control Inc., a Texas corporation, which I may own at my death. Their shares of the property bequeathed to the children of Perry R. Bass by this Paragraph (2) shall, during the minority of the respective recipients, be held, managed and controlled by Perry R. Bass as Trustee, each share being the original corpus of a separate trust. Each trust

shall in all respects be administered under and controlled by the terms of the Texas Trust Act as it exists at the applicable time. No bond or security shall ever be required of Perry R. Bass as such Trustee, and he shall have full power to distribute or withhold income to and from the several beneficiaries, as well as to appoint his successor, with like duties, powers and immunities, to succeed him in the event of his incapacity, resignation or death. Each trust so created shall terminate upon the death of its beneficiary or when such beneficiary reaches the age of twenty-one (21), whichever event occurs last.

3. I give to my sister, Annie Richardson Bass, One Hundred Thousand Dollars ($100,000); to my sister, Fayrene Richardson Smith, One Hundred Thousand Dollars ($100,000); and to my niece, Nancy Ann Kirksmith, One Hundred Thousand Dollars ($100,000). If my sister, Annie Richardson Bass, does not survive me, this bequest to her shall go in equal shares to those of her grandchildren (the children of Perry R. Bass) who survive me and, in that event, shall go into and as part of the corpora of the several trusts provided for in Paragraph (2) of this Article III. If my sister, Fayrene Richardson Smith, does not survive me, this bequest to her shall go to her daughter, Nancy Ann Kirksmith, if she survives me or to any issue of Nancy Ann Kirksmith if neither Fayrene Richardson Smith nor Nancy Ann Kirksmith survive me. If my niece, Nancy Ann Kirksmith, is not living at my death, the bequest to her shall go to her issue, if any, surviving her. If I am not survived by either Fayrene Richardson Smith or by Nancy Ann Kirksmith or by

issue of Nancy Ann Kirksmith, the bequests to Fayrene Richardson Smith and Nancy Ann Kirksmith shall lapse.

4. I give, devise and bequeath to my nephew, Perry R. Bass, my personal effects such as jewelry, sporting equipment and automobiles kept for personal use, books, souvenirs and memorabilia (other than such items as go to his children under Paragraph (2) of this Article III), and I direct that he keep for himself, or distribute as he sees fit, my clothing and similar effects.

5. Any debt due me at my death by Joe Daniel (chauffeur) shall be cancelled and, if he is employed by me at my death, I give, devise and bequeath to him Five Thousand Dollars ($5,000).

6. Nothing contained in this Article III shall be, or be construed as, a disposition of any painting which I may own at my death (other than family protraits, if any) or any airplane which I may then own.

ARTICLE IV

1. I give, devise and bequeath, subject only to the charge placed thereon by Paragraph (2) of this Article IV, all of the residue of my estate wherever situated which shall remain after the payment of debts and obligations, taxes and similar charges, the expense of administering upon my estate and the satisfaction of the bequests and devises made in Article III hereof, to SID W. RICHARDSON FOUNDATION, a Texas corporation without capital stock organized and operated for charitable, religious and

educational purposes, to be owned absolutely by said Sid W. Richardson Foundation, but to be used to further the purposes for which it was organized under the exclusive control of those from time to time constituting its Board of Directors, but to be expended wholly within the State of Texas. My Executors shall not be in anywise liable for the use or disposition made of such residue by Sid W. Richardson Foundation. There shall be included in the residue of my estate disposed of hereby all the income, if any, received by or accrued to my estate during the administration thereof. Portions of the residue of my estate disposed of hereby may be delivered by my Executors to Sid W. Richardson Foundation from time to time during the course of the administration of my estate if they deem it appropriate so to do.

2. The charge referred to in the preceding Paragraph (1) of this Article IV placed upon the residue of my estate bequeathed to Sid W. Richardson Foundation in said Paragraph (1) is this: Said Foundation shall pay from the corpus of the bequest so made to it in said Paragraph (1) to my sister, Annie Richardson Bass, the sum of One Thousand Dollars ($1,000) per month, and shall continue this for so long as she, the said Annie Richardson Bass, lives. Said payments so to be made by Sid W. Richardson Foundation shall be made beginning with the first day of the calendar month after Sid W. Richardson Foundation has received sufficient of the residue of my estate to make such a payment from the corpus of my estate, and similar payments shall be made monthly thereafter. Prior to the time Sid W. Richardson Foundation re-

ceives a sufficient amount of corpus from the residue of my estate to begin such payments, my Executors shall make like payments to my said sister from the corpus of my estate beginning with the first day of the first calendar month after the date of my death. My Executors and Sid W. Richardson Foundation shall keep all appropriate records so that each such payment so to be made to my sister can be identified as coming from the corpus of my estate or the residue thereof bequeathed to Sid W. Richardson Foundation.

ARTICLE V

1. If any legatee, or devisee, shall, directly or indirectly, contest or dispute the probate of this, my Last Will and Testament, or maintain before any judicial body that this is not my Last Will and Testament, or call in question before any tribunal the provisions of any legacy, devise, or other provision herein, then I absolutely revoke the legacy, devise or provisions to such legatee or devisee, and declare the same void and of no effect; the reversion from any such operative revocation to inure to the benefit of the non-contesting ones of those devisees named in Article III hereof.

2. Whenever, under any of the terms and provisions hereof, my Executors are required or permitted to value property for any purpose, any valuation made by said Executors, if made in good faith, shall be binding and conclusive upon all concerned.

ARTICLE VI

I hereby solemnly declare that I have never been

married to any person at any time at any place; that I have never entered into any marriage agreement with any woman at any time or place; that I have never lived with any woman as my wife and have never held out any woman as my wife to my friends, acquaintances or associates; that I have no common law wife and no descendants, legitimate or illegitimate.

However, having observed the experiences suffered by devisees and legatees of other men who died leaving substantial estates, and in order to minimize the temptation to unscrupulous persons to attempt to establish any such relationship with me, I make the following provisions:

(a) If by final judgment any person shall establish that, as a descendant of mine, he is entitled to share in my estate, then to each such person I give the sum of One Dollar ($1.00) and no more, and I direct that my Executors pay each such legacy as and only as such a final judgment is obtained in the Court of last resort;

(b) I direct that my Executors defend with all possible vigor any such suit that may be filed and to spare no expense in defeating any such fraudulent effort that may be concocted or made.

IN WITNESS WHEREOF, I have executed this instrument by signing my name hereto, and to each of the preceding fourteen (14) pages hereof, and have declared it to be my Last Will and Testament, in the presence of /s/ Cliff Gunter and /s/ W. P. Duncan,

Jr., who attest the same at my request, at Fort Worth, Texas, this 8th day of July, A. D., 1957.

/s/ S. W. Richardson
Testator

The foregoing instrument was signed by the Testator, S. W. Richardson (Sid W. Richardson), and by him declared to be his Last Will and Testament, in the presence of the undersigned attesting witnesses, and we, at his request and in his presence, and in the presence of each other, sign our names hereto as such attesting witnesses, and we, at his request and in his presence, and in the presence of each other, sign our names hereto as such attesting witnesses, this 8th day of July, A. D., 1957.

/s/ Cliff Gunter
/s/ W. P. Duncan, Jr.
Attesting Witnesses

CODICIL TO LAST WILL AND TESTAMENT OF S. W. RICHARDSON

STATE OF TEXAS }
COUNTY OF TARRANT }

I, S. W. Richardson (Sid W. Richardson), a bachelor, of Fort Worth, Tarrant County, Texas, being of lawful age and of sound and disposing mind and memory, do hereby make, publish and declare the following to be the first and only codicil to my Last Will and Testament, executed on July 8, 1957 in the presence of Cliff Gunter and W. P. Duncan, Jr., attesting witnesses; and except as expressly modified by this codicil, I reaffirm each and every provision of my said will of July 8, 1957.

ARTICLE ONE

(a) I eliminate from the provision made in Article III, paragraph 2, for the children of my nephew, Perry R. Bass, the bequest of the livestock which may be on St. Jose Island at my death, and in lieu thereof I give, devise and bequeath all of said livestock to my nephew, Perry R. Bass; and in addition thereto, I give, devise and bequeath to my said nephew all of my interest in the surface leaseholds, livestock and related properties, supplies and equipment connected with the ranching enterprise in which we are jointly interested in Wilson County, Texas, [and elsewhere SWR] this joint enterprise being operated upon leaseholds made to Perry R. Bass and to me by Panther City Investment Company.

(b) All of the bequests and provisions contained in

Article III, paragraph 3, are hereby stricken and canceled, and in lieu thereof I make the provisions contained in the succeeding Article Two hereof.

ARTICLE TWO

(a) I give, devise and bequeath to my sister Fayrene Richardson Smith ONE HUNDRED THOUSAND DOLLARS ($100,000).

(b) I give, devise and bequeath to each child of my nephew, Perry R. Bass, who may survive me, and to my niece Nancy Ann Kirkpatrick (the daughter of my sister Fayrene Richardson Smith) if she survives me, property of the value of TWO MILLION DOLLARS ($2,000,000) each, or, at the election of my Executors, said sum shall be made up partly of property and partly of cash or wholly of cash, these determinations and selections to be made in accordance with subsequent provisions hereof.

(c) I give, devise and bequeath to my sister Annie Richardson Bass, for her life, with remainder as hereinafter specified, property of the value of TWO MILLION DOLLARS ($2,000,000), or, at the election of my Executors, said sum shall be made up partly of property and partly of cash or wholly of cash, this determination and selection to be made in accordance with subsequent provisions hereof.

(d) My Executors shall have and are hereby given and granted full power and discretion to determine the extent to which the bequests made in paragraphs (b) and (c) of this Article Two shall be satisfied in cash and, to the extent such bequests or any of them

are not satisfied in cash, to determine what properties or interests in properties shall go to make up each of the bequests. Values for this purpose determined by my Executors in good faith shall not be subject to review or question in court or otherwise.

(e) The bequest made to my sister, Annie Richardson Bass, in paragraph (c) of this Article Two is for her life, and she shall have with respect thereto full and complete power of management, control, disposition, investment and reinvestment. At the death of my sister Annie Richardson Bass, all properties and funds which go to make up the bequest to her, as it shall then exist, shall go to and among whomsoever of her son and his issue (including his grandchildren) she may by her last will and testament appoint to take the same, and upon such terms, conditions, trusts and limitations as she may in such last will and testament provide and impose. To the extent that my sister Annie Richardson Bass does not effectively exercise this power of appointment, all of the property dealt with in this paragraph shall go in equal shares to such of her grandchildren (the children of Perry R. Bass) as may survive her, the child or children of any previously deceased grandchild taking per stirpes the share which would have gone to such deceased grandchild if living.

(f) During the minority of any child of my nephew, Perry R. Bass, the property devised and bequeathed to such child by paragraph (b) of Article Two hereof shall be held in trust by the said Perry R. Bass under the terms and conditions and as a part of

the trust to be created for such child under Article III, paragraph 2, of my said original will, with full power, without liability for so doing, in said Trustee to hold for so long as he deems appropriate any property constituting a part of any such bequest.

IN WITNESS WHEREOF, I have executed this instrument by signing my name hereto and to each of the preceding pages hereof, and have declared it to be the first and only codicil to my Last Will and Testament of July 8, 1957, in the presence of /s/ Harry C. Weeks and /s/ W. P. Duncan, Jr., attesting witnesses, who attest the same at my request, at Fort Worth, Texas, this 20th day of May, 1959.

/s/ Sid W. Richardson
Testator

The foregoing instrument was signed by the testator, S. W. Richardson (Sid W. Richardson), and by him declared to be the first and only codicil to his Last Will and Testament executed on July 8, 1957 in the presence of the undersigned attesting witnesses, and we, at his request and in his presence and in the presence of each other, sign our names hereto as such attesting witnesses, this 20th day of May, 1959.

/s/ Harry C. Weeks
/s/ W. P. Duncan, Jr.
Attesting Witnesses

REFUND CLAIM FOR 1960

FORM 843 (Rev. Dec. 1958)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **CLAIM** TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID	District Director's Stamp (Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps
Estate of S. W. Richardson, Dec'd (Taxpayer),
Sid W. Richardson Foundation (Transferee)

Number and street
1200 Fort Worth National Bank Building

City, town, postal zone, State
Fort Worth, Texas

Fill in applicable items. Enough below the sheets if space is not sufficient.

1. Social security number
8220

2. If an employee, enter employer identification number
Sid W. Richardson Foundation - 75-601-6020

3. District to which return (if any) was filed
Nnd Dist. of Texas - Dallas

4. Name and address shown on return, if different from above
Names and addresses on Taxpayer's and Transferee's returns as above shown

5. Period - If tax reported on annual basis, prepare separate form for each taxable year
From October 1, 1959, To September 30, 1960

6. Kind of tax
Income tax

7. Amount of assessment	Interest	Dates of payment
Tax $411,461.55 – $87,489.13		July 31, 1964

8. Date stamps were purchased from Government	9. Amount to be refunded	10. Amount to be charged (not applicable to income, estate, or gift taxes)
	$498,950.68 with interest	$

11. The claimant believes that this claim should be allowed for the following reasons:

Sid W. Richardson Foundation (a Texas non-profit corporation) is the transferee of the Estate of S. W. Richardson, Dec'd., and paid the tax and interest shown above. By virtue of Sec. 642(c) IRC of 1954, and the will of said decedent, said Estate was entitled to an unlimited charitable deduction in computing its income tax liability for its fiscal year ended September 30, 1960, in an amount not in excess of its gross income for said period, which gross income exceeded its net income and owed no income tax for said period. This unlimited charitable deduction was improperly limited in determining the deficiency so illegally assessed against said taxpayer and transferee. See, the income return of the Estate of S. W. Richardson, Dec'd. for said period, the report thereon of Internal Revenue Agent Raymond F. Kelly dated 5/18/63, the protest thereto of said Estate dated 7/8/63, and the certified copy of the will of said decedent S. W. Richardson (heretofore filed with the I.R.S.) all of which are incorporated hereto by reference.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed Sid W. Richardson Foundation

Dated Aug. 6, 64 By /s/ R. W. Sampson (R. W. Sampson)

President – Transferee

The claim for fiscal 1961 was identical except for amount and statement of the year involved.

EXCERPT FROM PLAINTIFF'S COMPLAINT IN TRIAL COURT

* * * * * *

V.

In administering upon the Estate of S. W. Richardson, Deceased, the Independent Executors of said Estate duly adopted, and continuously used, the accrual basis for accounting and income tax reporting and further adopted, and regularly used, fiscal years ending on September 30 in making income tax returns. The first of such fiscal years ended September 30, 1960. Income tax returns were duly filed for the Estate of S. W. Richardson, Deceased, by its Executors for its fiscal years ended September 30, 1960, and September 30, 1961. Although each of these returns showed substantial amounts of gross income (as well as net income before any deduction for charitable contributions) no tax liability was shown by either of said returns, and no income tax was paid by said Estate with respect to either of said returns until the deficiencies in income tax were determined to be due by said Estate for said years, as herein set forth, were paid by plaintiff. Plaintiff alleges that said Estate had no taxable income and no income tax liability for either of said fiscal years for the reason that the unlimited charitable deduction, to which it was entitled under Section 642(c), Internal Revenue Code of 1954, substantially exceeded its net income before any deduction for such charitable contributions or amounts permanently set aside for the purposes specified in Section 170(c), Internal Revenue Code of 1954, and/or to be used exclusively for religious, charitable, scientific, literary or educational purposes.

DEFENDANT'S ANSWER IN TRIAL COURT

The defendant, United States of America, by and through its attorney, Barefoot Sanders, United States Attorney for the Northern District of Texas, for its answer to the complaint herein alleges as follows:

I.

Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and second sentences of paragraph I. Denies the remaining allegations contained in paragraph I and alleges that the Internal Revenue Code of 1954 speaks for itself.

II.

Admits the allegations contained in paragraph II.

III.

Admits the allegations contained in paragraph III, except alleges that the claims for refund were filed on August 10, 1964, rather than August 7, 1964, and that such claims for refund speak for themselves. Defendant denies each and every allegation, ground or reason contained in such claims for refund not specifically admitted herein.

IV.

Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV.

V.

Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph V. Admits the al-

legations contained in the fifth sentence of paragraph V.

VI.

Denies the allegations contained in paragraph VI, and alleges that the Internal Revenue Code of 1954 speaks for itself.

VII.

Denies the allegations contained in paragraph VII, and alleges that the determination of tax liability by the Commissioner of Internal Revenue and the Internal Revenue Code of 1954 speak for themselves.

VIII.

Denies the allegations contained in paragraph VIII.

WHEREFORE, the defendant, United States of America, prays that this complaint be dismissed with prejudice, that all costs be assessed against the plaintiff and that defendant have such other and further relief to which it may show itself justly entitled.

/s/ Stan McMurry
United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing answer has this 21st day of December, 1964 been made on counsel for the plaintiff by depositing a copy thereof, postage prepaid, in the United States mail addressed to Harry C. Weeks, Esquire, Weeks, Bird, Cannon & Appleman, 525 Fort Worth National Bank Building, Fort Worth, Texas 76102.

/s/ Stan McMurry

PRETRIAL ORDER

This cause came on for pretrial hearing on June 1, 1965, before Honorable Leo Brewster, the plaintiff appearing by Harry C. Weeks, Esquire, Fort Worth, Texas, and the defendant appearing by Robert L. Waters, Tax Division, Department of Justice, Fort Worth, Texas. The following matters were disposed of in the manner indicated:

(1) No jurisdictional questions were raised.

(2) There were no questions raised by pending motions.

(3) The plaintiff claims a refund of income taxes and interest paid as transferee of the assets of the Estate of S. W. Richardson, Deceased, for the estate's fiscal years ended September 30, 1960, and September 30, 1961, in the total amount of $769,711.48.

(4) No affirmative claims were made by the defendant, but the defendant contends that the amount sought to be recovered was properly due and owing by the plaintiff as transferee of the Estate of S. W. Richardson, Deceased.

(5) There are no other parties to present claims.

(6) Counsel for the respective parties indicated that substantial progress has been made towards stipulating many of the facts applicable to the controversy, and that the completed stipulation would be filed in the near future.

(7) The contested issue of ultimate fact and law is whether, during each of the years ended September 30, 1960, and September 30, 1961, the gross income of the Estate of S. W. Richardson, Deceased, which pur-

suant to the terms of the governing instrument, was, during the tax year, paid or permanently set aside for the purposes or uses specified or referred to in Section 642(c) of the Internal Revenue Code of 1954, or was to be used exclusively for religious, charitable, scientific, literary, or educational purposes, exceeded the amount of its taxable income computed without regard to a deduction under Section 642(c).

(8) In lieu of exchanging and marking exhibits prior to pretrial, counsel for the parties were authorized to furnish each other and the Court with a list of the exhibits to be offered at trial not later than two weeks prior to the date of trial.

(9) Counsel indicated that no expert testimony would be offered.

(10) No amendments to the pleadings were requested or allowed.

(11) The probable length of trial is one day.

(12) The cause was set for trial on August 2, 1965.

ENTERED this 30th day of June, 1965, at Fort Worth, Texas.

/s/ Leo Brewster
LEO BREWSTER
United States District Judge

APPROVED:
/s/ Harry C. Weeks
HARRY C. WEEKS
Attorney for Plaintiff

MELVIN M. DIGGS
United States Attorney
By: /s/ Robert L. Waters
ROBERT L. WATERS
Attorney, Tax Division
Department of Justice
Attorney for Defendant

EXCERPTS FROM PLAINTIFF'S TRIAL BRIEF

QUESTION PRESENTED

Section 642(c), Internal Revenue Code of 1954, provides that an estate shall be entitled to deduct, in computing its taxable income, all of its gross income which, pursuant to the terms of the governing instrument, is either paid or permanently set aside for charitable purposes within the taxable year, or is to be used exclusively for charitable purposes.

The question presented is whether the amount of this deduction for either or both of the Estate's fiscal years ended September 30, 1960, and September 30, 1961, was large enough to absorb all of what would have been the Estate's taxable income calculated without such deduction.

SUMMARY OF ARGUMENT

A

The governing statute (Sec. 642(c), I. R. C. of 1954[1]) provides in plainest language that an estate, such as the Estate of S. W. Richardson, Deceased, should be allowed as a deduction in computing its taxable income such part of its *gross income*[2] as, under the terms of the governing instrument, is to be used for charitable purposes.

The stipulation and uncontested evidence establish:

(a) The governing instrument is the will of S. W.

[1]Set out in full at Page 8, supra.
[2]Emphasis supplied throughout unless otherwise noted.

Richardson. It provides that all income received during the period of administration is to fall into the residue of his estate bequeathed to Foundation.

(b) Foundation is a qualified recipient within the purview of Section 642(c), I.R.C. of 1954.

(c) No part of the Estate's income was used to satisfy the bequests made in the will to others than Foundation. All were satisfied from and properly chargeable to corpus.

(d) Revenues derived by the Estate were used either for necessary operation and maintenance of Estate properties or to pay claims against the Estate for debts or taxes, or to pay administration expenses, and, to the extent not so used, were delivered to Foundation as a part of the residue of the Estate.

This was required by the governing instrument (the will) and the statutory requirement for deductibility is thereby clearly established.

Since the Estate's gross income for each of the years involved largely exceeded its net or taxable income calculated without allowance of the applicable charitable deduction, the Estate owed no income for either year.

B

That the use of the Estate's gross income to pay debts, taxes, administration expenses, and the cost of maintaining and operating the properties of the Estate, all of which served to increase the value of the residue of the estate which went to Foundation, did not prevent its use in calculating the charitable deduc-

tion was plainly recognized by the taxing authorities in their determination of taxable income for fiscal 1961. $7,482,761.74 was allowed as a charitable deduction in that year, although substantially all of the Estate's gross income was used for operating or maintaining properties, administration expenses, and payment of debts and taxes.

ARGUMENT

A

The analysis should be made in the light of at least two controlling principles. One is that the Congress has always favored charitable organizations. This is shown by the fact that all or substantially all amendments to the provisions of tax laws dealing with charitable deductions have liberalized the deductions by increasing the percentage of income allowable or expanding the list of qualified donees, or in the case of estates, by adding, in the Revenue Act of 1924, the phrase now contained in Section 642(c) "or is to be used exclusively for religious, charitable, * * * purposes". The other is that statutory language is to be given its plain, ordinary meaning. In *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 301 U. S. 379 (1937), the court said (Page 383):

> "The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary * * *";

and at Page 384:

> "* * * Congress sought to encourage donations out of gross income, and we find no reason for

saying that it intended to limit the exemption to sums which the trust could show were actually paid out of receipts during a particular year.'"

See also *Helvering v. Bliss*, 293 U. S. 144; *U. S. v. Providence Trust Co.*, 291 U. S. 272.

Foundation is clearly entitled to recover all amounts sued for if the charitable deductions to which the Richardson Estate was entitled for its fiscal years ended September 30, 1960 and 1961 exceed the Estate's net income for each of those years calculated before allowance for any charitable deduction. Stated otherwise, the critical question in the case, and the only question in it, is the amount of the charitable deduction to which the Estate was entitled in each of said years.

Logically, an analysis of the controlling statutory provisions is the first step in determining the question. All of these statutory provisions are contained in the Internal Revenue Code of 1954.

Subchapter J of that Code, dealing with "Estates, Trusts, Beneficiaries, and Decedents", provides in Section 641(a) that the income taxes imposed by the Code upon individuals shall apply to the taxable income of estates of deceased persons received during the period of administration or settlement of the estate. It is then provided in Section 641(b) that the taxable income of an estate shall be computed in the same manner as that of an individual, except as otherwise provided in Part 1 of said Subchapter J. See

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*This case arose under the Revenue Act of 1928 and thus before the statute contained the phrase "or is to be used," etc., heretofore noted.

Pages 2 and 3, supra, for these statutory provisions.

The pertinent exception has to do with the amount of the charitable deduction allowed an estate in this computation of taxable income. Whereas the Code allows individuals a deduction only for charitable contributions "*payment for which is made within the taxable year*" and limits that deduction to 20%, and in some cases an extra 10%, of the individual's "adjusted gross income", (Section 170(a)(1) and (b), I. R. C. of 1954), the deduction allowed estates for charitable contributions (Section 642(c), I. R. C. of 1954 — Page 3, supra) has entirely different standards of calculation. In the first place, the amount of the deduction is "*without limitation*". The 20% and the extra 10% limitation on individuals have no application to estates. Second, instead of being measured by a percentage of "adjusted gross income", it is measured by "gross income". Third, the requirement that the contribution be paid within the taxable year is entirely eliminated, and there are two standards by which the deductibility of charitable contributions is to be determined. Each standard has to be "pursuant to the terms of the governing instrument". If this standard is met, then the contribution is deductible if "paid or permanently set aside" during the taxable year, and it is likewise deductible if the gross income claimed as a deduction is "to be used exclusively for religious, charitable," etc. purposes.

As heretofore noted, this latter phrase — "is to be used exclusively", etc. — was not in the law until the Revenue Act of 1924. At least from the enactment of the Revenue Act of 1918 until the Revenue Act of

1924 was enacted, the revenue acts in force required that the amount of the charitable contribution "be paid or permanently set aside" within the taxable year, and cases dealing with the charitable deductions of estates and trusts and arising prior to the enactment of the Revenue Act of 1924 should be read with this fact in mind.

The first element which enters into the calculation of the charitable deduction to which the Richardson Estate is entitled is the Estate's "gross income" for the pertinent year. Not only is gross income defined in the statutes (Section 61(a), I. R. C. of 1954, Page 4, supra), but it is stipulated in this case that the gross income of the Estate for its fiscal year ended September 30, 1960, was $15,673,905.55, and that its gross income for the fiscal year ending September 30, 1961, was $17,837,874.33. (Stipulation, Exhibits 3 and 4) Therefore, these entire amounts are deductible in computing the taxable income of the Estate for the respective years if the other requirements of said Section 642(c) of the Code are met. The statutory language so providing could be no plainer.

The first of these requirements is found in the phrase "pursuant to the terms of the governing instrument". The governing instrument in the case at bar is the will of S. W. Richardson. "Pursuant to" means what the Supreme Court said it meant in *Old Colony Trust Co. v. Commissioner of Internal Revenue* (1937), 301 U. S. 379, 383, where, in dealing with substantially the same question, it was said:

" 'Pursuant to' is defined as 'acting or done in

consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.' "

When the governing instrument is examined, these controlling facts appear: It was expressly provided that all income received or accrued during the time of administration was to go to Foundation along with the residue of the Estate. None of the private or individual beneficiaries named in the will were to receive any part of the income of the Estate. Specific amounts were bequeathed to these individuals, and in most cases these amounts, the will provided, could be satisfied in money or property. All of them were satisfied in property of the Estate except a comparatively small amount, some $256,060.36, whereas the decedent had on hand at the date of his death cash in the amount of $2,937,282.86. The entire residue of the Estate, including income received during the period of administration, was bequeathed and devised to the Foundation, which, by stipulation, was a qualified recipient, organized and operated exclusively for religious, charitable, and educational purposes.

The only remaining requirement, since it is not contended that during the tax years before the Court any amounts were actually paid from the Estate to Foundation, is that the gross income, or a sufficient amount thereof to offset otherwise taxable income, be "permanently set aside" for the Foundation or "is to be used exclusively" for or by it. Note here the phrase "is to be used". That clearly speaks of future use and cannot be tortured into a requirement that it be so used in the tax year. The addition to the statutory

phrase made in the Revenue Act of 1924 and carried forward in all subsequent acts would be meaningless if this were not so.

We turn, then, to ascertain just what was done by the Estate during the period of administration. This is shown by the Stipulation and the uncontradicted testimony of the witnesses. The will was duly probated. It has never been contested or its terms in anywise modified. The independent executors named therein duly qualified and at once began the administration of the large and complicated estate which thereby came into their hands. The decedent had died suddenly in the midst of a very active business career. The executors found themselves in possession of extensive holdings of land, cattle, oil properties, stocks, etc., active partnerships in the more important of which the decedent had owned the largest interest, closely held corporations active in business in which the decedent owned the controlling interest or the entire capital stock, as well as a substantial amount of what might be termed investment securities. Not only this, the executors found that the decedent was largely indebted, both on his individual account, as a partner, and as a guarantor or endorser of obligations in enterprises in which he was interested. In addition to this, they were faced with the absolute necessity of providing some $40,000,000 or more to pay death duties. They were charged by the will with the duty of managing, conserving, and preserving the decedent's estate, as well as the duty of satisfying the specific bequests heretofore mentioned. (Stipulation, Exhibit 2, pp. 3-5)

In carrying out these duties, no attempt was made by the executors to expand the activities in which the decedent was engaged. Instead, their expenditures with respect to the management of the estate were limited to those considered necessary to preserve estate values. (Stipulation, Art. XIII, page 11, and testimony of witnesses.)

By the close of 1961, substantial progress had been made in administering upon the estate. All specific bequests and devises had been satisfied except the monthly amount of $1,000 which the will provided was to go to the decedent's sister for her life out of the corpus of the estate during administration and out of the corpus of the residue received by the Foundation thereafter. There had been a substantial reduction in direct and indirect liabilities, as well as payments upon death duties. Some of the administration expenses had been paid. Thereupon, the entire residue of the estate was transferred, assigned, and delivered to Foundation subject to its then unpaid obligations (debts, death duties, and administration expenses), after which Foundation paid or provided for all of the obligations of the estate subject to which it had received these assets, and began the administration of the properties for the furtherance of the religious, charitable, and educational purposes for which it was organized. (Stipulation, Art. V, page 3, Exhibits 9-10, Testimony of Witnesses)

Thus, it will be seen that no part of the gross income of the estate during the entire period of administration went to any of the individual beneficiaries — they were provided for out of corpus — and that all

expenditures of funds during the period of administration were those necessary to pay debts, death duties, expenses of administration, and to manage and conserve the estate's properties as the will required. It can thus be fairly said that all of the gross income of the estate during the period of administration which was not ultimately received *as such* by Foundation was used to manage and conserve properties, and thus maintain or increase the values which Foundation received, or was used to pay debts and charges which were prior in right to the rights of Foundation and the satisfaction of which freed the residue received by Foundation from these burdens with which, in the first instance, the residue was primarily charged.

We come then to the question of whether these specified uses to which the gross income of the estate was put deprive the estate of its right to deduct its gross income as a charitable contribution for its two tax years before the Court. To defeat the Foundation's right to recover, the defendant must establish that such uses do defeat or lessen to the extent the taxing authorities did, the estate's right to deduct its gross income as a charitable contribution. A simple example will illustrate the precise point. Suppose that A conveys to a trust for the exclusive benefit of his church a parcel of revenue-producing real estate worth $500,000, but at the time of the conveyance, this real estate was encumbered by a lien of $100,000, under terms which required that a substantial part of the rents from the property be applied to the satisfaction of the lien, and that this application is so made. Could

it be contended that the revenues so used to free the property from the lien and thereby pro tanto increase the value of the contribution and the future revenues to be derived therefrom are not used exclusively for the religious purpose for which the property was contributed and were not required so to be by the trust instrument?

The great weight, if not all, of the authorities answer this question in favor of Foundation's position. We will not encumber this brief with all cases which might be considered pertinent, but will endeavor to cite, quote from, and analyze a sufficient number to establish the correctness of Foundation's position.

A leading text on federal income taxation is Mertens' *Law of Federal Income Taxation*. In the Cumulative Supplement to Volume 6 of that work, Page 202, it is stated:

> "The fact that some portion of the year's receipts, whether they are considered capital or income, is set aside for or may be used in subsequent years for payment of reasonable and legitimate expenses of protecting the assets and collecting the income of the trust for charitable uses, does not mean that such funds, or income, are not set aside or used for charitable purposes as long as the trustee is permitted to do so under the terms of the trust. A distinction must be made between cases where the provisions of the instrument itself render uncertain whether the charitable donees will actually take and cases where there is no uncertainty under the provisions of the instrument that net income must be used for charitable purposes, but valid claims and charges

against the trust render uncertain for the time being the exact amount of the net income which is committed to charitable purposes."

The text cites in support of this *Commissioner v. Leon A. Beeghly Fund*, 310 Fed. (2) 756 (C. A. 6, 1962), which will be discussed hereafter.

Our own Circuit Court of Appeals has held directly in favor of Foundation's position here. In *Commissioner of Internal Revenue v. Citizens & Southern National Bank*, 147 Fed. (2) 977 (C. A. 5, 1945), the Court, speaking through Judge Hutcheson, dealt with the situation thus described in the opinion:

"The taxpayer, executor under a will leaving all of the testator's property, subject to special bequests payable out of income, to a charitable foundation, to use the income for 'charity purposes', claimed deductions in 1936, 1937, 1938, and 1939 for payments of the bequests as allowable under Sections 162(b) or (c), amounts distributable currently to beneficiaries, and the balance as paid or permanently set aside for charitable uses pursuant to the will, and, therefore, allowable under Section 162(a), Revenue Acts of 1936 and 1938. The Commissioner disallowed the deduction claims on the grounds: (1) that part of the income from property, being by the will dedicated to the payment of bequests to persons not the subject of charity, the foundation was not a charitable corporation under Section 23(o)(3) and (o)(2), Revenue Act of 1936; (2) *that if it was such a corporation, the amounts paid out of the income and claimed as deductible under 162 (a) were not so deductible because having been paid to discharge debts and obligations of the es-*

tate, they had not, within the meaning of the statute, been paid or permanently set aside during the taxable year exclusively for charitable purposes; and (3) that the sums which had been paid out of income to satisfy the bequests were not deductible because they had not been paid by the foundation as directed in the will but by the executors, who had no authority under the will to pay them."

After further stating the facts and the contentions of the parties, the opinion continued:

"We agree with the taxpayer. The Tax Court in its opinion[1] has fully set the facts out, and has elaborately treated the questions of law here raised, and that opinion has our approval. We will not, therefore, further labor the points there discussed. We find it sufficient to say that the terms of the will, the facts surrounding its execution and administration, and the condition of the estate at testator's death, leave us in no doubt that his purpose was to create a charitable trust, to devise to it, subject only to the payment of his known debts for which he had ample cash on hand, all of his property, and, subject to the payment out of it of certain small bequests, to to dedicate and devote the entire income therefrom to charitable uses, has been sufficiently indicated and must be given effect. Neither are we in any doubt that in creating the foundation and in protecting the corpus against the unforeseen contingencies which arose after death, *the executor, by defraying corpus charges out of income, has not deprived the charity of the exemption the will and statute conferred whether the view*

[1] 3 T. C. 40.

is taken that the use of the income to pay corpus charges was a charitable use or the view that it was not, but being unauthorized by the will, it was a diversionary act of the executor without effect. The fact that the very large income was charged with the payment of very small bequests does not in any way alter the controlling fact that the will devised the whole corpus and, except for the bequests, the whole income to charity, and that the foundation was therefore such a corporation as is described in Section 23(o). Neither does the fact that part of the income was temporarily diverted to defray corpus charges affect the dedication to charity provided by the will, or subject the exempt income to tax. Finally, as to the payments of the bequests by the executor, we think it clear that the fact that they were paid by the executor instead of by the foundation is wholly immaterial. The Tax Court's judgment was right. It is confirmed."

Another case supporting Foundation is *Arthur Jordan Foundation v. Commissioner of Internal Revenue*, 210 Fed. (2) 885 (C. A. 7, 1954). The foundation in this case was created under a trust agreement which provided that its earnings and profits should be applied solely to charitable and related purposes, provided that a percentage of trust income should be retained and added to trust corpus as a permanent investment fund until net assets reached $5,000,000. The Commissioner had ruled that the foundation had become an association taxable as a non-exempt corporation because of its engagement in active business enterprises. The Tax Court held that the foundation was taxable as a trust, but limited its deduction for chari-

table contributions to the amounts actually expended in the year before the court for charitable purposes and upheld the tax upon the balance of its earnings which it had retained for investment. The court said (Page 887):

> "Thus, deduction may be claimed by a trust under the first part of Section 162(a) for all funds paid or permanently set aside to or for the use of such organizations as are described in Section 23(o). These organizations are themselves exempt from tax. Or, under the latter part of Section 162(a), deduction may be claimed for funds 'to be used exclusively' for charitable and related purposes, but the nature and character of the ultimate beneficiaries need not be as defined in Section 23(o)."

Later in the opinion (Page 888), the court said:

> *"It has frequently been held that income of an estate or trust accumulated during the taxable year is deductible, although it has not actually been given to a charitable organization or used directly for a charitable purpose.* (Citing cases) It is true that in those cases the funds so accumulated were destined for actual distribution to the charitable beneficiaries. In this case, of course, the particular funds which are retained and added to the permanent investment fund will never be distributed to the objects of the settlor's bounty. Those funds will be used to produce additional income, part of which again, under the terms of the trust instrument, will be retained for investment. This will be continued until the net assets of the trust equal the sum stipulated by the settlor, and even thereafter earnings may be used to replace losses suffered by the permanent fund.

Income so retained and invested is, naturally, subject to the hazards of investment * * *. The principle which to us seems controlling in this case is the reasonable certainty that the beneficent purposes of the trust will be greatly served as the investment further expands and reaches the goal fixed by the settlor. It may be expected that as the fund increases, the income available for direct application to charitable or related purposes will increase accordingly. There can be no other reason, under the terms of the trust instrument, for adding to the fund. On the other hand, anything which retards the growth of the fund necessarily reduces the amount of the income available for direct charitable purposes. The purpose of investment is solely and exclusively to produce more income for those purposes. To subject to tax that part of the income which is retained as a part of the corpus would thus very materially impair the possibility of achieving those objectives.

"It has long been a policy of Congress to encourage gifts for charitable purposes. Helvering v. Bliss, 293 U. S. 144; U.S. v. Provident Trust Co., 291 U. S. 272. As said in Old Colony Co. v. Commissioner, 301 U. S. 379, 'This language (of Section 162(a)) should be construed with a view of carrying out the purpose of Congress — evidently the encouragement of donations by trust estates.' We have concluded, therefore, that trust income here retained and invested was, within the meaning of Section 162(a), either permanently set aside for the use of organizations as described in Section 23(o) or used exclusively for charitable and related purposes. It follows that the claimed deduction should be allowed. The fact that during the taxable year in question the trust

was actively engaged in the conduct of a business for profit is not material in this case."

Perhaps the latest appellate court case upon the subject is *Commissioner of Internal Revenue v. Leon A. Beeghly Fund*, 310 Fed. (2) 756 (C. A. 6, 1962). That this case received the most careful consideration by the court and by the attorneys for the parties is sufficiently shown by the fact that it involved an income tax deficiency of something over $10,000,000. The very interesting facts shown in the opinion will be omitted, as the following is deemed sufficient for the purpose of this brief. Beginning at Page 759, the court said:

"Under the instrument of December 28, 1940, creating the Beeghly Fund, the donor assigned and transferred securities described in a schedule attached to the trustee (?) under an irrevocable trust created thereby for the use and benefit of corporations or associations, funds or foundations, organized and operated exclusively for religious, charitable, literary, or educational purposes, no part of the net earnings of which inured to the benefit of any private shareholder or individual and no substantial part of the activities of which was carrying on propaganda or otherwise attempting to influence legislation.

"For the purpose of directing the disbursement by the trustees of the net income from and principal of the trust estate, the trust instrument provided for an appointing committee to designate such disbursements of income or principal, which committee would from time to time, in writing, direct the payment of the net income from the trust estate and the disbursement of the principal

thereof among such beneficiaries as provided by the trust instrument.

"On August 12, 1941, the Commissioner issued a ruling that the fund was exempt from federal income tax under the provisions of Section 101 (6), Internal Revenue Code. On or about June 23, 1948, the Commissioner ruled that beginning December 28, 1945, the fund was no longer exempt under Section 101(6). He made no change in his earlier ruling that the Beeghly Fund was organized exclusively for the charitable purposes stated in Section 101(6), nor was there any suggestion that the trust had not been operated exclusively for charitable purposes during the period December 28, 1940, through December 27, 1945. The Commissioner does not depart from that position in the present proceeding. Income tax liability is claimed by reason of the purchase by the trustee on December 28, 1945, of all of the stock of Cold Metal, the dissolution of Cold Metal, and the obligations and actions of the trustee flowing from the contract of purchase of December 28, 1945.

"Section 162(a), prior to its amendment in 1950, provides that the net income of a trust shall be computed in the same manner and on the same basis as in the case of an individual, except that there should be allowed as a deduction 'any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes * * *'.

"We believe that if the deduction qualifies in

other respects, there is no question about the deduction being a valid one, even though no payment is actually made to the charitable beneficiary during the taxable year. The statute does not require that it be actually paid — it requires that it be 'paid or permanently set aside'. Arthur Jordan Foundation v. Commissioner, 210 Fed. (2) 885 (C. A. 7). See: Ohio Furnace Co. v. Commissioner, 25 T. C. 179, 190.

"The Commissioner contends that no part of the gross income of the trustee in 1949 was in fact or could have been permanently set aside for charitable organizations during that year because the trust agreement did not operate ipso facto to permanently set aside any amount for charity, but instead affirmative action in that connection by an appointing committee was required. No such affirmative action was taken in the present case. *The statute, however, does not make the deduction dependent upon the action of the fiduciary in crediting upon its books to a certain beneficiary the income received by it.* The allowance of the deduction in controlled by the statute, not by a provision in the trust instrument which goes beyond the requirements of the statute. We are of the opinion that the Tax Court was correct in rejecting this contention. (Citing cases) * * *.

"The Commissioner contends that income could not be permanently set aside for charitable purposes unless income was available for that purpose, and the fact that the trust had net income in the taxable year does not mean that it had income available to be set aside for charity. *He points out that the gross income received by the trust in 1949 was subject to legal obligations — (1) the payment of income tax, and (2) the pay-*

ment of the obligations assumed by the trustee under the 1945 agreement — which obligations were greater than the amount received by the trust in 1949, thereby leaving no funds available to be set aside for charitable organizations. Or stated another way, the gross income received by the trust in 1949 was all committed to purposes other than charitable purposes. He relies upon the rule that if there is a probability under the terms of the grant that property bequeathed to a charitable trust may be invaded as to corpus or income so that the amount ultimately available for charitable purposes is not ascertained or capable of ascertainment, then it cannot be said that any amount is permanently set aside for the charitable uses which the statute permits to be deducted. (Citing cases)

"We think that a distinction must be made between cases where the provisions of the instrument itself render uncertain whether the charitable donees will actually take, and cases where there is no uncertainty under the provisions of the instrument that net income must be used for charitable purposes, but valid claims and charges against the trust estate render uncertain for the time being the exact amount of the net income which is committed to charitable purposes. (Citing cases)

"*In the present case, there is no legal uncertainty about the entire net income being committed to charitable purposes.* The amount is, of course, uncertain until the end of the taxable year, being controlled by the amount of gross income received and the deductions therefrom of legal operating expenses, including such items as rent, salaries, supplies, postage, and taxes, which amounts will

vary from year to year. But such uncertainty does not deprive such a taxpayer of the deduction granted by Section 162(a) after the amount thereof has been definitely determined. *Essentially, it would seem that the nature and legality of the disbursements by the trustee is the controlling factor, rather than the fact that the exact amount of the resulting net income is temporarily uncertain.* * * *

"As pointed out in those cases, the payments to the sellers of the Cold Metal stock was the payment of the consideration in a purchase of stock for value received, and there was no diversion of income to a non-charitable purpose in the trustee paying its legal debts before distributing the balance to the charitable organizations designated in the trust instrument."

The court thus upheld the Tax Court opinion allowing the charitable deduction claimed.

An earlier and one of the leading cases is *Bowers v. Slocum*, 20 Fed. (2) 350 (C. A. 2, 1927). Even though this case involved a year in which the controlling statute did not contain the "is to be used" provision heretofore noted, the court said:

"Section 219(b) does not make the statute depend upon the action of the executors in crediting the income on their books, but upon the permanent setting aside of the income by the will itself for corporations of the character in question."

In summary, the measure of the Estate's charitable deduction in each year is its gross income for that year; whether this gross income is permanently set

aside or is to be used for charitable purposes is to be determined by the Richardson will; this will in plainest terms dedicates all estate income and all residue to Foundation, which is a qualified charity; the income went to Foundation either as such or by defraying charges encumbering the residue or necessary to protect values. The facts, the law, and the cases require that Estate's gross income in each year be allowed as a charitable deduction. So doing requires judgment for plaintiff for all amounts for which it sued.

EXCERPTS FROM DEFENDANT'S TRIAL BRIEF

C. Foundation's assertation that gross income is the only limiting factor on the charitable deduction is erroneous

The general theme of Foundation's brief is that the estate's charitable deduction is limited only by the amount of its gross income for the two years at issue. This position derives from the following language in Section 642(c): "* * * any amount of the gross income, without limitation * * *."[1] The words "any amount of" before the words "gross income" clearly imply that something less than the entire gross income shall constitute the charitable deduction. We believe proper analysis will show that congressional usage of the term "gross income" was meant to designate the character of income qualifying for the deduction rather than the quantum of income so qualifying.

Section 61 of the Internal Revenue Code of 1954, Appendix, *infra*, sets forth in detail the various types, kinds or character of receipts and revenues that are included in the income tax computation and denominated gross income. The sum of the several amounts included by that listing will, in any given case, comprise the quantum of the gross income. There are, additionally, items of income and revenue that are either expressly excludable from gross income or are not included because of a tax-exempt character. Thus, it is perfectly appropriate that Congress distinguish the

[1] The "without limitation" expression is used to show that the percentage limitations governing individuals do not apply to limit the charitable deduction of estates and trusts. See Sec. 170(b), Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 170).

items enumerated in Section 61, *infra*, from excludable or exempt items by referring to the former as items of "gross income". This is precisely what it has done in Section 642(c), and it has done so for the express purpose of insuring that a trust or estate does not pay over to or permanently set aside for charity an item of revenue either excludable from gross income or tax-exempt and then claim a charitable deduction from the gross income therefor. See Treasury Regulations on Income Tax (1954 Code), Sec. 1.642(c)-2, Appendix, *infra*. In the following language, the House Ways and Means Committee and the Senate Finance Committee identically expressed the intention of Congress respecting this matter:[11]

> If the estate or trust pays, permanently sets aside, or uses any amount of its income for the purposes specified in this subsection and such amount includes any items of trust income not entering into the gross income of the estate or trust, the deduction under this subsection is limited to the gross income so paid, permanently set aside or used.[12]

The foregoing statement should suffice to negate any conclusion that the total gross income is *per se* the proper amount of the charitable deduction. We proceed somewhat farther, however, since we believe the Foundation's brief has made only part of the argu-

[11] See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A193 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4033); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 342 (3 U.S.C. Cong. & Adm. News (1954) 4629, 4982-4983).

[12] Compare the limitation contained in Section 2055(d) of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 2055).

ment upon which it relies. We anticipate the full argument so that we may argue our side of the matter.

The Foundation has previously maintained that computation of the estate's net operating income (See Exs. 3, 4) has included deductions for such non-cash-expenditure items as depreciation and depletion deductions, but that such items do not serve to reduce gross income. (See pp. 6-7 of the protest letter of July 8, 1963, included in Exhibit 5.) We interpret this expression to mean that the cash additions to depletion and depreciation reserves will go to the Foundation as part of the residue, and such amounts should be deemed part of the income set aside for charity.

There is, of course, a very basic repugnance to the thought that any item ought to be taxed twice. There is, too, that same repugnance to the claim that an item ought to be twice deducted. The latter, however, is precisely what Foundation has asserted is the estate's right in computing its income tax liability, for a deduction has been allowed the estate for depreciation and depletion. If the reserves built up by those deductions are again deducted under the guise of an amount permanently set aside for charity it will surely amount to a double deduction.

Such a double deduction ought not to be allowed unless the language of the statute clearly compels it. The preceding argument adequately demonstrates, we think, that the statutory language as properly construed avoids that result. There is additional evidence, however, that Congress has affirmatively sought to avoid granting double deductions in the charitable-

deduction area. First, as recounted above, the "gross income" language was employed to avoid the allowance of charitable deductions arising out of the use of tax-exempt revenue — a form of double deduction. Secondly, Congress has expressly provided in Section 642(c) that an appropriate adjustment must be made to the charitable deduction to insure that it is not permitted to duplicate the capital gains deduction permitted by Section 1202 of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 1202). We invite the Court's attention at this point to the Supreme Court's disinclination to permit the use of the charitable deduction as a means to twice deduct the same item. See *United States v. Benedict*, 338 U.S. 692.

There is a final and persuasive reason why the estate should not be permitted a second deduction for reserves built up by depreciation and depletion deductions. Those reserves represent a change in the form of the assets comprising the corpus of the estate, with the change being brought about by the passage of time during which the assets are employed to produce revenues. Such usage results in a piecemeal conversion of the asset, and year to year there must be added to a reserve account (a different asset) an amount which, together with the depreciated or depleted asset, will be the equivalent of the asset in its original state. To permit a deduction for additions to depletion and depreciation reserves in the guise of an amount permanently set aside for charity would be to permit a deduction for payments to be made from corpus, and that is clearly beyond the intendment of the statute.

EXCERPTS FROM PETITIONER'S OPENING BRIEF IN CIRCUIT COURT

ISSUE PRESENTED FOR REVIEW

Generally, the issue presented for review is the proper method of determining the amout of the charitable deduction to which ESTATE is entitled in computing its taxable income and income tax liability for its fiscal years ended September 30, 1960 and September 30, 1961.

Specifically, does Code Section 642(c) [S 39] allow as a charitable deduction all of the gross income of ESTATE for the respective periods which, under the terms of WILL, the governing instrument, was to and did actually go to FOUNDATION; or, * * *

SUMMARY OF ARGUMENT

I.

(a) The measure of the charitable deductions to which ESTATE is entitled under the mandatory provisions of Section 642(c) of the CODE is ESTATE'S "gross income" for the respective tax years which, "pursuant to the terms of the governing instrument," is "permanently set aside for a purpose specified in Section 170(c) or is to be used exclusively for * * * charitable * * * purposes * * *."

(b) The "governing instrument" (WILL) provided that all of ESTATE'S income "received or accrued" during administration, along with the residue of ESTATE, was to go to FOUNDATION.

(c) FOUNDATION is admittedly a qualified recipient under Sections 170(c) and 642(c) of the CODE.

(d) ESTATE'S gross income for each of the years involved (over $15,000,000 for fiscal 1960 and $17,000,000 for fiscal 1961) exceeded by millions of dollars in each year ESTATE'S net income for the tax period, determined before any charitable deduction.

(e) The use of ESTATE funds to pay debts, taxes, expenses of administration, and costs incurred in conserving ESTATE properties were proper uses which did not lessen ESTATE's right to measure it charitable deductions by its "gross income" as the statute directs. None of ESTATE'S gross income went to the individual beneficiaries named in WILL, or could have gone to them.

(f) The trial Court erred in disregarding the mandatory provision of CODE Section 642(c) and in basing his determination of ESTATE'S charitable deductions upon the net income of ESTATE, as determined by the taxing authorities, rather than upon gross income.

EXCERPTS FROM APPELLEE'S BRIEF IN CIRCUIT COURT

The balance of taxpayer's brief deals with the contention, best summed up by the taxpayer's statement that "The taxing authorities, in assessing the taxes involved, entirely disregard the statutory mandate with respect to gross income and began their calculation of the charitable deduction with net income before any deduction for charity, instead of gross income * * *." (Br. 17, 21, 23.) In effect, taxpayer appears to argue that the charitable deduction is limited only by the amount of the gross income for the two years in issue. This point derives from the language of Section 642(c), "* * * any amount of the gross income, without limitation * * *". The words "any amount of" before the term "gross income" clearly imply that something less than the entire gross income shall constitute the charitable deduction, and analysis will show that Congressional usage of the term "gross income" was meant to designate the character, rather than the quantum, of income qualifying for the deduction.

Section 61 of the Internal Revenue Code of 1954, Appendix, *infra*, sets forth in detail the various types, kinds or character of receipts and revenues that are included in the income tax computation and denominated gross income. The sum of the several amounts included by that listing will, in any given case, comprise the quantum of the gross income. There are, additionally, items of income and revenue that are either expressly excludable from gross income or are

not included because of a tax-exempt character. Thus, it is perfectly appropriate that Congress distinguish the items enumerated in Section 61, *infra*, from excludable or exempt items by referring to the former as items of "gross income". This is precisely what it has done in Section 642(c), and it has done so for the express purpose of insuring that a trust or estate does not pay over to or permanently set aside for charity an item of revenue either excludable from gross income or tax-exempt and then claim a charitable deduction therefor from the gross income. See Treasury Regulations on Income Tax (1954 Code), Sec. 1.642(c)-2, Appendix, *infra*. In the following language, the House Ways and Means Committee and the Senate Finance Committee identically expressed the intention of Congress respecting this matter:[11]

> If the estate or trust pays, permanently sets aside, or uses any amount of its income for the purpose specified in this subsection and such amount includes any items of trust income not entering into the gross income of the estate or trust, the deduction under this subsection is limited to the gross income so paid, permanently set aside or used.

The foregoing statement should suffice to negate any conclusion that the total gross income is *per se* the proper amount of the charitable deduction.

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[11]See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A193 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4033); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 342 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4982-4983).

EXCERPT FROM PETITIONER'S FIRST PETITION FOR REHEARING IN CIRCUIT COURT

What has been said above renders it unnecessary to discuss the cases cited in this Court's opinion which support the well-established and unquestioned doctrine that in most cases, a claim for refund must present the claim upon which the claimant's later suit is based, such as *Carmack v. Seufeld*, 201 F. 2d 360, 362 (5th Cir., 1953), and *Alabama By-Products v. Patterson*, 358 F. 2d 892, 900 (5th Cir., 1966); but it should be noted that the per curiam opinion on petition for rehearing in *U. S. v. Smith*, 418 F. 2d 589 (C.A. 5, 1969), at Pages 597 and 598, clearly supports the contention that even if the claims for refund had been inadequate, which they were not, it would be entirely appropriate for this Court to consider the plaintiff's claim for an unlimited charitable deduction when the defendant did not advance the defense by pleading or brief below or in its brief in this Court, and only advanced it by a plain mis-statement in response to the Court's request for memoranda dealing not with the refund claims but with other specific points.

EXCERPT FROM SECOND PETITION FOR REHEARING IN CIRCUIT COURT

. . . .

2. Even if the reasoning of the Court in the Per Curiam opinion be correct (which Plaintiff-Appellant emphatically denies) on the point there decided, the Court failed to consider or to give effect to the fact that the defect, if any, in the claims for refund based upon the right of the Estate to a deduction of its gross income used or set aside for charitable purposes under Section 812(c) was waived by the Defendant-Appellee.

EXCERPT FROM BRIEF SUPPORTING SECOND PETITION FOR REHEARING IN CIRCUIT COURT

3. The U. S. continuously understood that Foundation's primary position was that it was entitled to a full recovery because its stipulated gross income, all of which was by governing instrument (Richardson's will) dedicated to, and went to, charity, largely exceeded its net income calculated before allowance of the charitable deduction.

4. The U. S. clearly waived any right, if any it had, to object to the asserted inadequacy of Foundation's refund claims by:

(a) Not raising the question in its answer to Foundation's complaint. (R. 13-14)

(b) Not raising the question at the pretrial hearing, or at the trial below, or in its brief in the trial Court.

(c) By agreeing to a stipulation which clearly presented facts in support of this position.

(d) By not raising the question in its original brief filed in this Court and arguing the merits of Foundation's claim. (Appellee's original brief in this Court, pp. 32-34)

That inadequacies in a refund claim can be effectively waived is supported by highest authority. None of the cases deal with facts as clearly establishing a waiver as do those present in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1216

SID W. RICHARDSON FOUNDATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 23–38) is reported at 306 F. Supp. 755. The opinion of the court of appeals and its further opinion on rehearing (Pet. App. 39–50) are reported at 430 F. 2d 710.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1970, the day on which a second petition for rehearing was denied. The petition for a writ of certiorari was filed on January 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's claims to unlimited charitable deductions pursuant to Section 642(c) of the Internal Revenue Code were not properly before it and, in any event, were without merit.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Treasury Regulations are set forth in the petition (pp. 3–5) and the Appendix thereto (pp. 51–53).

STATEMENT

Petitioner is the transferee of the assets of the Estate of Sid W. Richardson and, as such, is liable for the Estate's tax obligations. Richardson died on September 20, 1959, owning various interests in oil and ranching enterprises, including all of the outstanding stock in Richardson Oils, Inc. ("Oils"), a corporation taxable as a partnership pursuant to Subchapter S of the Internal Revenue Code.[1] At his death, all of his interests passed to his Estate. By his will, Richardson made a number of specific bequests and left the residue of his estate to petitioner, a qualifying tax-exempt foundation. The will directed that any income "re-

[1] A corporation electing to be taxed under Subchapter S (Sections 1371–1378 of the Code) pays no corporate income tax. Instead, each of its shareholders includes in his gross income for his taxable year both the distributions actually received from the corporation during the year and his share of the corporation's undistributed taxable income for the corporation's year that ends during his taxable year. See Section 1373.

ceived by or accrued" to the Estate during its administration was to be included in the residue. After satisfying the specific bequests out of corpus, the executors, on January 1, 1962, transferred the Estate's remaining assets to petitioner, subject to all of the Estate's unsatisfied obligations. (R. 155–158.)[1]

During the years in issue (the fiscal years ended September 30, 1960 and September 30, 1961), Oils continued its business operations and maintained its tax status as a Subchapter S corporation. It accordingly did not have to pay any corporate income taxes. Rather, the Estate, as Oils' sole shareholder, was required to include in its own gross income both the dividends received from Oils and Oils' remaining taxable income which was not distributed. This latter income, amounting to $492,016.18 for fiscal 1960, and $300,466.14 for fiscal 1961, was retained and used by the corporation and not made available to the Estate during the years in issue. (R. 161–162.)

On its income tax returns for these fiscal years, the Estate included Oils' undistributed taxable income in its gross income as required. It claimed deductions for this income under Section 642(c) of the Code, which provides that certain estates may deduct "any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for * * * charitable * * * purposes * * *." As a result of other claimed deductions, which offset the

[1] "R." references are to the record appendix in the court of appeals which we have filed with the Clerk of this Court.

Estate's other income in full, its returns for each of the years reflected no tax liability. (R. 161–162.)

Upon examination of the returns, the Commissioner disallowed the Estate's charitable deductions of the undistributed income of Oils. The basis for the disallowance was that this income, although includable in the Estate's gross income, remained under the dominion and control and subject to the use of Oils, and was neither paid nor owing to the Estate during the taxable years. It consequently did not meet the requirement of Section 642(c) that it be "paid or permanently set aside" for charity "during the taxable year."

Petitioner thereafter filed separate claims for refund for each of the fiscal years (R. 105, 116), in each instance asserting that the Estate was "entitled to an unlimited charitable deduction" under Section 642 (c), and incorporating by reference the protest it had previously filed with the Internal Revenue Service (Pet. App. 49–50). That protest stated the basis for petitioner's claims as follows (Pet. App. 48):

> So, in essence, the deficiencies in income tax proposed against the taxpayer in the examining officer's report are based upon what he determines to be the undistributed Subchapter S income of Richardson Oils, Inc. included in its tax returns for the respective periods. It appears that the correctness of this action is the *only* issue involved. [Emphasis added.]

In its briefs in the district court, petitioner pressed its claim relating to the treatment of the undistributed Subchapter S income for purposes of Section

642(e). It also repeatedly asserted that the Estate was entitled to an unlimited charitable deduction under that section. In this connection, it alluded to other unspecified income that might be deductible under Section 642(e) and thereby eliminate the tax deficiencies resulting from the Commissioner's disallowance of the deduction for Oils' undistributed taxable income. These broad statements, which were not related to any specific income, were obscured in the context of the Subchapter S issue, and the district court accordingly dealt only with that issue. It upheld the Commissioner's determination that the undistributed Subchapter S income was not, pursuant to the terms of the Richardson will, "paid or permanently set aside" for charity "during the taxable year" (Pet. App. 23–38). Petitioner did not seek rehearing of the district court's decision.

In its opening brief in the court of appeals, petitioner discussed only the Subchapter S question with particularity, although it again claimed that the Estate was entitled to an unlimited charitable deduction. Then, in its reply brief, it set forth in detail figures and computations purporting to show the Estate's entitlement to additional Section 642(c) deductions. At oral argument, the court directed the parties to file supplemental memoranda relating to the matters raised in petitioner's reply brief. Following receipt of these memoranda, the court put a number of written questions to the parties. They filed simultaneous answers, and petitioner subsequently filed a reply to the government's answers. The court of appeals then affirmed

the district court's decision as to the undistributed Subchapter S income (Pet. App. 39–50). It also held (Pet. App. 47–48) that petitioner's further claim had been improperly advanced, since it represented an entirely different ground for recovery than the ground specified in petitioner's claims for refund.

Petitioner filed a petition for rehearing, and supporting brief, and the court directed the government to file a response. The court then rejected the petition in a *per curiam* opinion, stating (Pet. App. 50):

> The entire record strongly indicates that the theory of the taxpayer's claim for refund was based upon its contention that the undistributed Subchapter S income of Richardson Oils was a part of the estate as distinguished from the corporate entity. Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the court. * * *

A second petition for rehearing was denied without comment, but only after the court considered an additional brief filed by petitioner and the government's response thereto.

ARGUMENT

The decision below is correct. There is no conflict or other basis for further review.

1. Petitioner complains at this juncture that the court below failed to give consideration to the arguments it advanced in support of its theory that it was entitled to an unlimited charitable deduction. But the court did consider the arguments raised in petitioner's reply brief and in its numerous post-argument submissions and rejected them, as evidenced by its *per curiam* opinion. Moreover, contrary to petitioner's

contention, the Fifth Circuit was not required to consider these arguments.

The filing of a timely claim for refund is a statutory prerequisite to a suit to recover taxes alleged to have been illegally collected. See Section 7422(a) of the Code; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269. The principal requirement of the statute is that the Commissioner be apprised by the timely filing of a claim of the precise basis on which the claim is predicated. *United States* v. *Pierotti*, 154 F. 2d 758 (C.A. 9). Under applicable Treasury Regulations (Sec. 301.6402-2(b)) broad and general language in a claim is not sufficient. Rather, it "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Having advanced one ground in a claim for refund, a taxpayer may not thereafter rely on a different ground in its subsequent suit for refund. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528; *Alabama By-Products Corporation* v. *Patterson*, 258 F. 2d 892, 900 (C.A. 5).

That is what petitioner attempted to do. Its refund claims, when considered with the prior protest which it incorporated therein by reference, referred specifically only to the Commissioner's treatment of the undistributed Subchapter S income. The general claim that it was entitled to an unlimited charitable deduction did not emerge with any specificity until petitioner filed its reply brief in the court of appeals. Petitioner did not, as required by the regulations, "set forth in detail each ground upon which a credit or refund

is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof" with regard to what it now says (Pet. 13) is its "primary position."

Nor is there any basis in these circumstances for petitioner's assertion (Pet. 12–16, 19) that the government waived the defects in the refund claims by pleading and briefing the so-called unlimited charitable deduction issue. Prior to the filing of petitioner's reply brief in the court of appeals, the government did no more than deny, using the same general language used by petitioner, the Estate's entitlement to an unlimited charitable deduction. Petitioner recognized as much in that brief when it advised the court (p. 6) that there was no need for it to consider the question of the treatment of Oils' undistributed income, "which is the only one seriously dealt with in Appellee's brief * * *."

There is thus no conflict on the question of waiver between the decision below and this Court's holding in *Tucker* v. *Alexander*, 275 U.S. 228. As the Court explained in *United States* v. *Garbutt Oil Co.*, *supra* at p. 534, the *Tucker* case involved an express waiver by the government as to an issue not covered in a refund claim, but which was the only issue litigated in the trial court. There is likewise no conflict with the decision of any other appellate court. *Brown* v. *United States*, 427 F. 2d 57 (C.A. 9), and *Mennen Co.* v. *Kelly*, 137 F. 2d 866 (C.A. 3), both involved situations in which the issues not presented in the claims for refund had been initially injected into the cases by the government, rather than the taxpayers. The facts of this case are not comparable.

That the Fifth Circuit, like every other circuit, follows the rule of *Tucker* v. *Alexander*, *supra*, is shown by its opinion in *United States* v. *Smith*, 418 F. 2d 989, which was finally decided less than a year before its decision in this case. The court found on the facts there presented that the government had waived a defect in a refund claim. The instant case thus involves only the question whether, in the particular circumstances, a waiver had been established. That narrow issue does not warrant further review.

2. At all events, petitioner's additional claim is without merit. It rests on the proposition that although the Estate reported gross income for fiscal 1960 and 1961 of $2 million and $0.7 million, respectively, petitioner stipulated to gross income of $15 million and $17 million for these years (Pet. 16). As we understand these larger figures, they include the gross income of a variety of businesses in which the Estate had an interest, unreduced by the deductions actually allowed to those businesses. Thus, petitioner appears to be claiming a Section 642(e) deduction for expenses that have already been deducted under other provisions of the Code, a procedure which this Court has held to be impermissible. See *United States* v. *Benedict*, 338 U.S. 692.

If, on the other hand, the $15 million and $17 million figures represent income remaining after allowed business deductions, then petitioner's gross income as reported on its returns was understated by $13 million and $7.3 million, respectively. In this event, even as-

assuming that petitioner would be entitled to additional deductions of $12 million and $7.3 million,[1] this would do no more than offset the additional gross income that should have been included in its returns. Petitioner's tax liability would remain the same, since Olin's undistributed taxable income would still be includable in its gross income but would not be deductible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

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[1] Such deductions would not be allowable if the additional gross income, like the undistributed Subchapter S income, was neither paid nor owing to petitioner during the taxable year. See *Freund's Estate* v. *Commissioner*, 302 F. 2d 30 (C.A. 2).

No. 1216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

SID W. RICHARDSON FOUNDATION, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply to the Brief for the United States in Opposition

INTRODUCTION

Numerous, important and, we believe, inexcusable inaccuracies in the statements contained in the brief for the United States in opposition to the Petition for Certiorari to which it is directed impel Petitioner to reply thereto and to point out such inaccuracies.

The terminology used in the Petition for Certiorari will be followed here. "Richardson" will refer to the decedent, Sid W. Richardson; "Estate" to the Estate of Sid W. Richardson, Deceased; and "Foundation" to Sid W. Richardson Foundation, the Petitioner. Further, "A" will refer to the Appendix attached to the Petition for Certiorari, and "R" to the appendix filed with the United States Court of Appeals for the

Fifth Circuit, and which, according to the brief of the United States in opposition, was filed with the Clerk of this Court. "Charity" or "charitable" will include all of the purposes or objects specified in Section 170(c)(2)(B), I.R.C. of 1954. "Petition" will refer to the Petition for Certiorari.

1. The Court will realize that the part of such brief which deals with the merits of the so-called "Subchapter S" question is irrelevant. That question is not raised by the Petition; the questions presented are clearly set forth on Pages 2 and 3 thereof.

2. The brief in opposition admits (Page 5) that it was repeatedly asserted that the Estate was entitled to an unlimited charitable deduction under Section 642(c), but states that these broad statements "were not related to any specific income." The governing instrument, the will, set apart all income, and all assets (not income), not used to satisfy specific bequests, for Foundation. Too, this is an irrelevant cloud newly conjured to avoid having the one issue which the Foundation has consistently raised considered on the merits. The obvious reason for not specifying any particular item of gross income is that it is by statute irrelevant on the facts under review, to-wit, the amount of gross income was stipulated, and the statute allows the deduction for "any amount of the gross income." Thus, in spite of Foundation's best efforts to have the "gross income" question considered, the brief in opposition is almost accurate in stating (Page 5): "* * * and the district court accordingly dealt only with that issue (the Subchapter S issue)."

The word "accordingly" erroneously implies that the district court's reason for its action was that the gross income question was not raised by Foundation. That court's opinion (R. 151) gave no such reason, and the record is amply inconsistent with such a statement. See Point 4 at Pages 4 and 5 below. That "Petitioner did not seek rehearing of the district court's decision," is as easily explained by the fact that the case had been under submission in the district court from October 15, 1965, to April 1, 1969 (over three and one-half years). Failure to restate a position already submitted to the district court is more properly attributed to Foundation's desire to have a more expeditious consideration of both of its claims than for any other reason.

3. The brief in opposition states (Page 5):

> "In its opening brief in the court of appeals, Petitioner discussed only the Subchapter S question with particularity, although it again claimed that the Estate was entitled to an unlimited charitable deduction."

That this is an incorrect statement is established by excerpts from such brief in the court of appeals, reproduced in the Appendix to Petition, Pages 106-7.

4. At Page 7 of the brief in opposition, it is stated:

> "The general claim that it was entitled to an unlimited charitable deduction did not emerge with any specificity until petitioner filed its reply brief in the court of appeals."

The following facts establish that this statement is wholly incorrect. The most casual examination of the record would show, as hereinafter detailed, that from the beginning to the present time, the primary contention of Foundation was that it was entitled to an unlimited charitable deduction, that it established all of the facts necessary to support such a claim, and that in each pleading and brief filed in either court below, the issue was presented on its merits.

(a) In the pretrial order (R. 78-79), it was stated:

> "The contested issue of ultimate fact and law is whether * * * the gross income of the Estate of S. W. Richardson, deceased, which * * * was to be used exclusively for religious, charitable, scientific, literary, or educational purposes, exceeded the amount of its taxable income computed without regard to the deduction under Section 642(c)."

(b) The amount of the Estate's gross income for each of the years was stipulated. (R. 67)

(c) Paragraph 5 of the complaint in the trial court (R. 6-7) alleged:

> "That said Estate had no taxable income and no income tax liability for either of said fiscal years for the reason that the unlimited charitable deduction, to which it was entitled under Section 642(c), Internal Revenue Code of 1954, substantially exceeded its net income before any deduction for such charitable contributions or amounts * * * to be used exclusively for religious, charitable, scientific, literary, or educational pur-

poses."

Defendant's answer (R. 13) denied these allegations.[1]

(d) The greater portion of the lengthy stipulation (R. 60-78), as well as the exhibits thereto, and substantially all of the oral testimony (R. 14, et seq.), had no pertinency to the Subchapter S question, but only bore upon the unlimited charitable deduction question; and, in its opinion at R. 152, the trial court expressly recognized the question was in the case, although that court's failure to consider the matter further is inexplicable, for at that time and until much later, no suggestion of the inadequacy of the refund claims to present the question had been raised.

(e) All of the above conclusively shows that the "unlimited charitable deduction" question was in the case from the beginning, that the trial court so understood, that the defendant met the issue from the beginning and until after submission to the Circuit Court and that there was no suggestion that the claims for refund were inadequate to present the issue until *after* the case was argued in the Circuit Court.

5. The statement in the brief in opposition (Page 8):

> "Prior to the filing of petitioner's reply brief in the court of appeals, the government did no more than deny, using the same general language used by petitioner, the Estate's entitlement to an unlimited charitable deduction,"

[1] By unexplainable *oversight*, the defendant's answer to this allegation was misstated. (A. 76-77) That portion of the defendant's answer correctly appears at R. 13.

is wholly incorrect. The facts are that in defendant's brief in the trial court (Page 7), it was stated:

> "Although each of these returns showed substantial amounts of gross and net income, exclusive of deductions claimed to be allowable under Section 642(c), Internal Revenue Code of 1954, neither of the returns showed any taxable income because deductions under Section 642(c) claimed in good faith by the executors exceeded the Estate's taxable income calculated without such deductions (Stip. par. IV)."

See also defendant's extended argument on the question at Pages 23-28 of its trial court brief. (A. pp. 102 to 105)

6. The brief in opposition states (Page 6):

> "But the court did consider the arguments raised in petitioner's reply brief and in its numerous post-argument submissions and rejected them, as evidenced by its *per curiam* opinion."

If there is any support for this statement, it is found in Footnote 8 to the Circuit Court's original opinion (A. 47), where, after holding that the unlimited charitable deduction question was improperly advanced, the court stated:

> "If we reached this question, we seriously doubt that the Foundation's argument could be accepted. It insists again on deductions for amounts never received by the Estate and never designated for charitable uses;"[2]

[2]The trial court found (R. 161): "No part of the revenues received by the Estate during these years was used for any purpose other than operation, maintenance, and protection of the properties of the Estate, and payment of debts and taxes, including death duties, and expenses of administration."

and the statement in the per curiam opinion (A. 50):

> "Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the court. We adhere to the conclusion reached * * * and that Foundation is not entitled to deduct from income, as charitable contributions under §642(c), IRC of 1954, amounts representing undistributed income of the Subchapter S corporation."

Since the Circuit Court held in its original opinion that the unlimited charitable deduction question was not properly before it, such casual observations cannot be considered as a holding on the merits of the unlimited charitable deduction question. Rather, the quoted statements support Foundation's claim that the court (1) recognized that the issue had been presented but (2) was arbitrarily refusing to grant Foundation the consideration of the issue on the merits to which it is entitled. It clearly does not evidence the type of consideration that the merits of this contention justify.

7. Further, the brief in opposition states (Pages 7-8)

> "Petitioner did not, as required by the regulations, 'set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof' with regard to what it now says (Pet. 13) is its 'primary position.'"

If the Commissioner was not so apprised, which he obviously was, it was because of his reading of the

claims improperly narrowed by the unique doctrine of "limitation by incorporation by reference." The claims were not inadequate. Each stated:

> "By virtue of Section 642(c), IRC of 1954, and the will of said decedent, said Estate was entitled to an unlimited charitable deduction in computing its income tax liability for the fiscal year ended September 30, 1960, in an amount not in excess of its gross income for said period, which gross income exceeded its net income, and owed no income tax for said period." (R. 105)

The claim for fiscal 1961 (R. 116) contained identical language, except for the substitution of September 30, 1961, for the earlier year. The whole course of the proceeding through the submission of the case to the Circuit Court shows beyond question that the respondent was fully advised of Foundation's position from the filing of the claims to the present time. There was no element of surprise. Instead, until after the case was submitted to the Circuit Court, the government, without at all questioning the adequacy of the refund claims, fairly and frankly opposed both of Foundation's positions on the merits.

8. The brief in opposition states (Page 8):

> "There is thus no conflict on the question of waiver between the decision below and this Court's holding in *Tucker v. Alexander*, 275 U.S. 228."

The *Tucker* case does not support this statement. In that case, the grounds stated in the claim were abandoned in the trial court, and the point litigated was

only that the Commissioner had erred in decreasing the March 1, 1913, value of property later distributed. This point was not raised in the petition in the district court nor in the claim for refund. In the course of the trial, the petitioner abandoned the points raised in its petition and attacked only the March 1, 1913, value. The court said:

> "That issue alone was litigated. At the close of the trial counsel stipulated that, if the court found the deduction to have been erroneously made, the petitioner should have judgment in the sum named. The District Court's judgment for petitioner was reversed by the Circuit Court of Appeals for the Eighth Circuit (15 F. 2d 356) which held that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924. * * * The case was brought here on certiorari to review this determination." (Pages 229-230)

The Supreme Court went on to say:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. *During the entire course of the trial no question was raised as to the sufficiency of the claim for refund.* The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913." (Page 230) (Emphasis supplied)

The court further said (Page 231):

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

This holding is all the more applicable and decisive of the claim for refund question in the present case because the government was not deceived or misled, as heretofore set out. Unless the asserted inadequacy first occurred to one of the attorneys who briefed the case for the appellee in the Circuit Court and who also is a signatory to the brief in opposition in this Court after the case was argued, and if instead it was always intended to raise the question when considered necessary, the action was truly setting a "trap for the unwary," and no argument or authority can justify or excuse it.

9. The concluding portion of the brief in opposition, that beginning under 2 on Page 9, finally reaches the merits of the Foundation's primary issue, on which issue Foundation is seeking a full review. The brief's one page treatment shows a complete misunderstanding, or if not that, a complete misstatement, of principles governing income taxation which might properly by classified as Hornbook Law. This is an added reason why this Petition should be granted. The essence of the position taken there is that the gross income of the Estate for the fiscal years involved was understated. Procedurally and factually, this is truly a strange contention at this point in the litigation when the Estate's gross income for both years was stipulated. It is also strange in that it is stated (Page 9):

> "If, on the other hand, the $15 million and $17 million figures represent income remaining after allowed business deductions, then petitioner's gross income as reported on its returns was understated by $13 million and $7.3 million, respectively. In this event, even assuming that petitioner would be entitled to additional deductions of $13 million and $7.3 million, this would do no more than offset the additional gross income that should have been included in its returns. Petitioner's tax liability would remain the same, since Oils' undistributed taxable income would still be includable in its gross income but would not be deductible."

Never before, we submit, has it been contended that "statutory gross income" represents income remaining after allowable business deductions. The gross

income which was stipulated and which is the outside measure of the allowable charitable deduction is the gross income as defined in Section 61 of the Code and as expressly added thereto by other portions thereof, to which detailed reference need not be made. Gross income is the starting point of an income tax computation. No deductions enter into the determination of its amount. See Section 61, IRC of 1954.

An issue so basic to the interpretation of the revenue laws deserves full review on the merits, either by this Court or on remand from this Court to a lower court. Securing that review is the essence of this Petition.

Finally, the brief in opposition attempts to avoid the applicability of the statutory mandate that "gross income" is the basic figure for determining the charitable deduction by asserting, on the authority of *United States v. Benedict*, 338 U.S. 692, that an impermissible double deduction is sought by Foundation: (i) the deductions taken in computing the Estate's net income before allowance of the charitable deduction, and (ii) a charitable deduction measured by gross income before such deduction. But the fallacy of this is easily demonstrated.

The situation presented in this case is unique in that income, gross or net, was not to be divided between taxable recipients and charity, as is the more usual situation. Here, practically speaking, the situation is the same as would have existed had the will made no provision for individual beneficiaries, for these were satisfied out of specific assets, leaving the

remainder "and all income received or accrued" during administration to Foundation. Every penny which Foundation was required to pay the Internal Revenue Service and herein seeks to recover reduces pro tanto the amount Foundation can use for its charitable purposes; and that is exactly what Congress, by using the phrase "any amount of the gross income, without limitation," intended to prevent.

The Respondent's reliance on *Benedict* is misplaced. There, income was to be divided between taxables and charity. An attempt was made to use a non-adroit provision as to taxation of long-term capital gains to benefit the taxables, not the charity. This benefit was denied in *Benedict*. Obviously, the holding in *Benedict* has no pertinency here.

Respondent completely overlooks the established rule that authorized use of gross income to pay debts, taxes, and claims (all prior claims on the corpus of the estate), and disbursements to protect estate properties, are uses for charitable purposes. *Commissioner v. Citizens & Southern Natl. Bank* (CA 5 1945), 147 F. 2d 977; *Bowers v. Slocum* (CA 2 1927), 20 F. 2d 350.

CONCLUSION

The Circuit Court gave no serious consideration to the merits of Foundation's claim for the full benefit of the charitable deduction granted estates by Section 642(c). Instead, by holding that the refund claims were inadequate to present the question, after it had been litigated on the merits in two courts without any suggestion of inadequacy and after Foundation's rights to amend the claims had expired by limitation, it approved setting a "trap for the unwary," contrary to decisions of this Court and its own decisions cited in the petition for certiorari, and committed irregularities in practice which should not be overlooked but which should be corrected by this Court, so that the charitable deductions to which Estate was clearly entitled can be allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of ....., 1971, five copies of this Reply to the Brief for the United States in Opposition have been served on Respondent's attorney in envelope with sufficient postage prepaid and properly addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Harry C. Weeks
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